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No. _____

In The

Supreme Court of the United States

October Term, 1986

DAN L. BOLDEN,
Petitioner,

-vs-

JOHN MERLO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER *SANDSTROM* v *MONTANA*, 442 US 510 (1979) SHOULD BE APPLIED RETROACTIVELY?

II.

WHETHER THE JURY INSTRUCTION, ALTHOUGH VIOLATIVE OF *SANDSTROM* v *MONTANA*, 442 US 510 (1979), WAS HARMLESS BEYOND A REASONABLE DOUBT?

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DAN L. BOLDEN,
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-vs-

JOHN MERLO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed September 18, 1986, and is reported at __ F2d __ (1986). The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 27, 1985. The decision of the United States Court of Appeals for the Sixth Circuit was filed September 17, 1985. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed January 28, 1985. Copies of all these opinions are included in the Appendix to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed September 18, 1986. The jurisdiction of this Court is invoked under 28 USC 1254(1). The decision of the Court of Appeals is based on *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979); *Rose* v *Clark*, 476 US ___; 106 S Ct 3101; 92 L Ed 2d 460 (1986); and *Conway* v *Anderson*, 698 F2d 282 (CA 6, 1983); *cert den* 462 US 1121; 103 S Ct 3092; 77 L Ed 2d 1352 (1983).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision this petition involves is the Due Process Clause, which is:

Constitution of the United States, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Respondent Merlo was convicted in state court of first-degree murder, MCLA 750.316, in 1967 by a jury trial. Merlo was sentenced to mandatory life imprisonment and has been incarcerated since his conviction. The

Michigan Court of Appeals affirmed his conviction in an opinion which found the evidence of premeditated murder to be overwhelming. *People* v *Merlo*, 23 Mich App 694, 703 (1970). The Michigan Supreme Court denied Merlo's delayed application for leave to appeal on October 27, 1975. A 1977 application for writ of habeas corpus was denied. The jury instruction now in question was not challenged in any of these proceedings.

In 1982, Respondent first raised the *Sandstrom* violation in a delayed motion for new trial. The motion was denied. In mid-1983, the Michigan Court of Appeals denied his delayed application for leave to appeal. The Michigan Supreme Court denied leave in late 1983.

The United States District Court first granted Respondent's writ of habeas corpus in January, 1985. The district court found the jury instruction violated *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979), and that this error was not harmless. On appeal, the Court of Appeals, without ruling on harmless error, remanded to the district court for consideration of procedural default. The district court found the state courts had not relied on Respondent's failure to object to preclude state court appellate review, and that *Wainwright* v *Sykes*, 433 US 73; 97 S Ct 2497; 53 L Ed 2d 594 (1977), did not apply. The district court again granted Respondent's application for writ of habeas corpus. The Court of Appeals affirmed the district court. Petitioner, Warden Bolden, now seeks review of the decision of the Court of Appeals.

At trial, Merlo did not contest the fact that he shot his wife four times in the beauty shop where she was working. As defense counsel stated in a pretrial motion, "The facts are such that the shooting is hard to be denied, and the defense must be that there was no premeditation." (R, 99)

Rose Marie Schmidt, a beauty shop customer, saw Merlo arrive. (R, 111) Merlo and his estranged wife, Sharon, a hairdresser, went into the furnace room. (R, 113) The doors to the furnace room were open. Merlo and his wife were back there about five minutes or so. Rose Marie was five feet from the open doors but did not hear any sounds. (R, 114) Sharon came out and went to work on another customer. Merlo came out and shot Sharon. He fired two of the shots after Sharon was on the floor. (R, 115) Merlo walked out of the shop. His gait was normal. (R, 115)

Another customer, Diane Brennan, also saw Merlo walk into the shop and go into the back room with his wife. (R, 160) Merlo and the victim were very quiet. (R, 164) Diane tried to listen to their conversation. (R, 181) She saw Merlo shoot his wife. Merlo was three to four feet from the victim, used a chrome pistol, and never said a word. (R, 166)

Andrea Pojarski was a hairdresser in the shop. (R, 188) She saw Merlo come in, she exchanged casual greetings with him. (R, 189) Andrea heard Sharon ask Respondent, "What are you doing here? Why don't you go home?" (R, 190) Andrea saw Sharon come out of the back room. Andrea did not see Merlo come out right after Sharon. Andrea heard the shots but did not watch the shooting. (R, 192)

Sylvia Stewart, a customer, saw Merlo come in. (R, 212) She was aware that Merlo and the victim had gone into the back room. (R, 215) She heard the shots. (R, 213)

Martha Stanfield owned the beauty shop. She knew Merlo and saw him come in. (R, 217) They exchanged greetings. (R, 218) Merlo motioned for Sharon to come to the back room. Nothing appeared unusual. (R, 219)

Prior to Merlo's arrival, Sharon had spilled water on the floor. Martha went into the back room where Merlo and Sharon were to get towels. Merlo and Sharon were just standing there. (R, 219-220) At one point, Sharon came out of the back room, got a cigarette, and returned to the back room. Martha heard Sharon use the word "car." (R, 223) Martha described Merlo's behavior that day as normal, quiet and courteous. (R, 233) Martha did not see any spit on Merlo's face nor any slap marks. (R, 238)

Sharon's customer, Lois Whitaker, saw Merlo come in the door. (R, 242) After Sharon and Merlo had been in the back room, Sharon came out first and just began working on Lois. (R, 244) Merlo came out of the back room and was two feet from Lois's chair when he began shooting Sharon. (R, 245) Sharon started slumping and Merlo shot some more. (R, 246) When Merlo stood in front of Lois's chair, his arm was extended and the gun was in his hand. There were no marks nor any spittle on Merlo's face. (R, 266) Merlo had put a bullet on the seat of Sharon's car about three weeks before the shooting. (R, 258)

Dr. Richard E. Oleson testified that Sharon Merlo had been shot four times. One shot struck the midline front of her skull. It severed the brain stem, causing instant death. (R, 151-152) One shot struck at the midline base of the neck at the upper end of the breast bone. It passed through the large artery from the heart and through the windpipe. (R, 151-152) Either of these shots would have been fatal. (R, 153) Two more shots struck in the front abdomen. There were corresponding exit wounds. (R, 151) Merlo was in the army for three years and knew how to use firearms. (R, 419)

About three weeks after the murder, Merlo was arrested in Philadelphia by a bank detective when Merlo

attempted to cash a forged check. Merlo was carrying the murder weapon when he was arrested. (R, 303, 315)

Merlo confessed to the Philadelphia authorities that he had shot his wife four times. He said she was working on a lady's hair when he fired. (R, 343-345)

Diane Wilshire, Sharon's sister, testified that Merlo hit Sharon once and broke her glasses. Merlo was not barred from the house (where Sharon lived with her parents). Merlo always left the house quickly so he could avoid being served with the divorce papers. (R, 414) Merlo visited Diane in the hospital and showed her his gun. He told her he was not afraid of anyone. (R, 415)

Respondent Merlo testified that prior to the murder he saw his wife's car parked at her boyfriend's apartment. Merlo smashed up the dashboard of his wife's car and pulled out the spark plug wires. (R, 451) He said he used a .38 caliber gun to smash the gauges and the bullet flew out of the gun. He did not leave it on the seat. (R, 515) The day of the murder, he had eight shots and beers in an hour and went straight to the beauty shop. (R, 457) During his talk with Sharon in the back room of the beauty shop, she called him a punk and spit in his face. It enraged him so he shot her. (R, 463-464) The boyfriend was part of it. (R, 538)

Several months after the murder, Respondent telephoned the victim's mother. He said, "I'm not sorry I did it. I warned her ahead of time. I left a bullet in the front seat. I haven't shed a tear over it." (R, 553-554)

JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Federal jurisdiction was invoked in the Court of Appeals under 28 USC 2253.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's first question is whether *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979) should be retroactively applied. The United States Court of Appeals for the Sixth Circuit has given *Sandstrom* full retroactive effect. *Conway* v *Anderson*, 698 F2d 282 (CA 6, 1983); *cert den* 462 US 1121; 103 S Ct 3092; 77 L Ed 2d 1352 (1983). The position of the Sixth Circuit conflicts with the holding of the Michigan Supreme Court on this issue. *People* v *Woods*, 416 Mich 581 (1982). The issue of *Sandstrom*'s retroactivity has never been addressed by this Court.

In the instant case, Respondent Merlo was convicted of first-degree murder in a well-tried case in 1967. One dozen years later, in 1979, the Court decided *Sandstrom*. Almost six years after the decision in *Sandstrom*, the district court, following Sixth Circuit precedent, applied *Sandstrom* retroactively to Respondent.

The Constitution neither compels nor prohibits retroactive application of new constitutional rules. *Linkletter* v *Walker*, 381 US 618, 629; 85 S Ct 1731; 14 L Ed 2d 601 (1965). In *United States* v *Johnson*, 457 US 537; 102 S Ct 2579; 73 L Ed 2d 202 (1982), this Court established a three-fold test to be applied prior to the *Linkletter* test. The first *Johnson* rule is that a decision of the Court which only applies settled precedent to new fact situations will be retroactively applied. The second *Johnson* rule is that a new rule which is expressly declared to be a clean break from past precedent will be prospectively applied. The third *Johnson* rule is that a decision by this Court that the trial court lacked authority to convict or punish will be retroactively applied.

An application of the *Johnson* rules to *Sandstrom* provides little guidance. None of the three rules precisely fits the holding in *Sandstrom*.

In *Sandstrom*, this Court found a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" improper under the Due Process Clause of the Fourteenth Amendment. A reasonable juror could interpret such an instruction as creating a presumption or as shifting the burden of persuasion to the accused. The goal of *Sandstrom* was to insure that "only the guilty are criminally punished." *Rose* v *Clark*, 478 US __; 106 S Ct 3101; 92 L Ed 2d 460, 472 (1986).

Although *Sandstrom* relies on prior cases which analyzed presumptions in light of the reasonable doubt standard, *Sandstrom* is neither the application of settled precedent to new fact situations nor a clean break with the past. *Sandstrom* relies primarily upon two cases, both of which were decided after Respondent was convicted. These cases are *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970), retroactively applied by *Ivan* v *City of New York*, 407 US 203; 92 S Ct 1951; 32 L Ed 2d 659 (1972) and *Mullaney* v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), held retroactive in *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977). *Winship* held that a conviction may stand only upon proof beyond a reasonable doubt of every fact necessary to show the elements of the crime charged. *Mullaney* struck down rebuttable presumptions which explicitly shifted the burden of proof to the defendant on any element of the crime charged.

Sandstrom represents an evolution of the constitutional principles recognized in *Winship* and *Mullaney*. *Sandstrom* is not an application of settled precedent, a clean break with the past or a challenge to the trial court's authority.

To determine retroactivity, this Court must examine these three factors: 1) the purpose to be served by the new rule, 2) the extent of reliance on the old rule, and 3) the effect on the administration of justice of retroactive application of the new rule. *Stovall* v *Denno*, 388 US 293, 297; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

The purpose of the rule is to insure that only those who are guilty are criminally punished. In *Rose* v *Clark*, *supra*, this Court examined the possible effect a *Sandstrom* violation might have on a jury verdict to determine whether a harmless error analysis could be applied. This Court recognized that the truth-finding function of the jury is not substantially impaired by a *Sandstrom* violation when it found that a *Sandstrom* violation is not the equivalent of a directed verdict of guilty.

> When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v *Johnson*, 460 US 73, 96-97, 74 L Ed 2d 823, 103 S Ct 969 (1983) (Powell, J., dissenting). In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. See, e.g., *Lamb* v *Jernigan*, 683 F2d 1332, 1342-1343 (CA 11 1982), cert denied, 460 US 1024, 75 L Ed 2d 496, 103 S Ct 1276 (1983). In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt. See *Connecticut* v *Johnson*, *supra*, at 97, 74 L Ed 2d 823, 103 S Ct 969 (Powell, J., dissenting); Jeffries & Stephen, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale LJ 1325, 1388, n 192 (1979).
>
> *Rose* v *Clark*, 97 L Ed 2d 472.

The possibility of unreliable results due to a *Sandstrom* instruction depends upon the unlikely occurrence that an *entire jury* first perceives and then impermissibly interprets a single phrase in lengthy jury instructions. *Sandstrom* represents a situation that is fundamentally different in degree from previous cases where new rules implicating the reasonable doubt standard have received complete retroactive effect. *Winship, supra; Mullaney, supra.*

The difference in degree between the *Sandstrom* instruction rule and the rule in *Winship* and *Mullaney* justifies giving substantial weight to the other two *Stovall* factors, *i.e.*, the extent of reliance on the old rule and the effect of the retroactive application of the new rule on the administration of justice. Consideration of these factors cuts strongly against retroactive application of *Sandstrom. United States* v *Spiegel*, 604 F2d 961, 969 (CA 5, 1979).

In *People* v *Woods*, 416 Mich 581 (1982), the Michigan Supreme Court closely examined *Sandstrom* and its predecessors, *Winship* and *Mullaney*, to determine whether *Sandstrom* should be retroactively applied. The Court first found that *Sandstrom* differed in great degree from *Winship* and *Mullaney* because the "truth-finding function is not substantially impaired in a *Sandstrom* situation." *Woods, supra*, 620. The Court then looked at the other two *Stovall* factors and held:

> The last two factors in the *Linkletter-Stovall* approach are the reliance on the old standards and the effect on the administration of justice. In Michigan, instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, *People* v *Medley*, 339 Mich 486; 64 NW2d 708 (1954); *People* v *Hodges*, 196 Mich 546; 162 NW 966 (1917); and by the

> Court of Appeals, *People* v *Nelson*, 35 Mich App 368; 192 NW2d 682 (1971); *People* v *McBride*, 30 Mich App 201; 186 NW2d 70 (1971). Conceivably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
>
> Given this reliance, the effect full retroactivity would have on Michigan's system of justice is unacceptable. Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. Taking this into consideration with the purpose of the *Sandstrom* rule, we feel full retroactivity is unwarranted.
>
> *Woods, supra,* 620-621; footnotes omitted.

The Court then limited the retroactivity of *Sandstrom* to those cases pending on direct appeal when *Sandstrom* was decided. *Woods, supra,* citing *United States* v *Johnson, supra*. In the instant case, Respondent Merlo was convicted in 1967. His conviction was affirmed by the Michigan Court of Appeals in his appeal by claim of right in 1970. His application for leave to appeal was denied by the Michigan Supreme Court in 1975. *Sandstrom* should not be retroactively applied to Respondent. Such a retroactive application of *Sandstrom* puts a heavy burden upon the People of the State of Michigan to retry a murder case after a lapse of nearly twenty years.

The balance of factors favors limited retroactivity at best. *Sandstrom* should not be retroactively applied to cases where the judgment and all direct appeals were final by the date of *Sandstrom*'s decision. This Court should grant this petition for a writ of certiorari and hold that *Sandstrom* is not fully retroactive.

II.

The second question presented by Petitioner asks this Court to review the Sixth Circuit's application of *Rose* v *Clark, supra,* to the facts of this case. In *Rose* v *Clark,* this Court recognized that a *Sandstrom* violation may have very little effect on a jury verdict because a jury cannot presume malice from predicate facts without first finding those facts beyond a reasonable doubt. *Rose* v *Clark,* 97 L Ed 2d 472. In the instant case, the Sixth Circuit merely recited the evidence presented on both sides, said it was "balanced" and affirmed the district court in a published decision. A misapplication of *Rose* v *Clark* by the circuit to which that very case was remanded could have a far-reaching negative effect. To preclude this possibility, this Court should review the facts of the instant case in light of *Rose* v *Clark, supra.*

The victim, Sharon Merlo, was a hairdresser in a beauty shop in Farmington Township, Michigan. On the morning of January 6, 1967, Sharon Merlo, four customers, the beauty shop owner, another hairdresser, and the young son of one of the customers were in the shop. Respondent Merlo walked into the shop. When the owner asked him how he was, he said he was fine. He motioned to Sharon to go into the back room with him. The back room had two doors; both remained open while Merlo was in the shop.

Sharon followed Merlo into the room, came back out shortly after that, lit a cigarette, and returned to the room. Merlo and Sharon were in the room about five minutes or so. During this time, they remained close to the open doors. While they were in there, the owner went in the room twice and the other hairdresser went in once. Neither of these two women nor any of the cus-

tomers ever heard any loud talking or shouting. No one heard any slaps.

Sharon came out of the back room, went to her customer, got behind the customer's chair, and put her hand on the customer's shoulder. By this time, Merlo had *walked* out of the back room and was standing two feet in front of the customer's chair. His arm was extended before him. He fired four shots in all, two of them after Sharon was either on the floor or slumping down.

Respondent *walked* out of the shop, drove his rented car to Cleveland where he abandoned it. (R, 345) He took a train to New York, changed trains, and arrived in Philadelphia less than 24 hours after shooting his wife. (R, 345) He checked into an inexpensive hotel. (R, 345) He was arrested about three weeks later in a Philadelphia bank while attempting to cash a forged check. (The reason for his arrest was not put before the jury.) Merlo confessed to the Philadelphia police that he shot his wife four times. He was carrying the murder weapon when he was arrested.

About two months before the murder, Sharon had filed for divorce. After this, Merlo saw his wife's car parked near her boyfriend's apartment. He smashed up the gauges on the dashboard and pulled out the spark plug wires. He left a .38 caliber bullet on the front seat as a warning. Merlo testified he always carried ten shells for his .38 in each pocket. (R, 514)

Also prior to the murder, Merlo visited Sharon's sister, who was in the hospital giving birth. Merlo showed her his gun and said he was not afraid of anyone. Merlo also said he would kill himself if Sharon would not come back to him.

Merlo had moved back to his hometown of Niles, Ohio, after his wife filed for divorce. (R, 454) He sold the .38 in Niles and bought a .32. (R, 515) He rented a car, drove to Michigan after work on Friday evening, January 5, 1967. (R, 456) He stayed in a motel that night. (R, 456) Sometime between 10:30 and 11:00 the next morning, Merlo shot his wife four times with the .32.

One entry wound was at the midline front of her skull. It severed the brain stem, and caused instant death. A second entry wound was at the midline base of the neck at the upper end of the breast bone. It passed through the large artery from the heart and through the windpipe. This shot would have been fatal by itself. There were two entry wounds to the front of the abdomen with corresponding exit wounds. Merlo was familiar with guns — he was in the army for three years.

Merlo testified he had consumed eight shots and beers before going into the beauty shop. There was no testimony that he smelled of alcohol. There was no testimony that he staggered. His walk was described as normal. Merlo testified that he and his wife argued in the back room, she slapped him and spit in his face. No one heard any loud talking or shouting. No hairdryers were going. (R, 120) There was no testimony that anyone heard any slaps. No one saw any marks on Merlo's face. No one saw any moisture on Merlo's face.

Merlo testified that when his wife called him a punk and spit in his face, it enraged him so he shot her. Testimony showed that when Merlo caught his wife and her boyfriend necking in a car, Merlo stuck his head in the window to inquire how they were doing (R, 436) and if they were having fun. (R, 506) Merlo never said the amount of alcohol he consumed in any way affected his

ability to reason. It apparently did not affect his flight to Philadelphia, either.

Merlo's confession to the Philadelphia authorities did not include any reference to arguing or to being slapped or spit upon.

Merlo's defense rested solely upon his own testimony. The only portion of his testimony corroborated by any other witnesses concerned his statement that he would kill himself if Sharon did not come back to him.

Merlo said he drank eight shots and beers immediately prior to entering the beauty shop. No one testified that he smelled of alcohol or that his speech was slurred. His walk was normal.

Merlo said Sharon enraged him by calling him names, spitting on him and slapping him. No one heard any quarreling. No one heard any slaps. Merlo bore no slap marks nor spittle on his face when he walked out and gunned down his wife.

The jury in the instant case did not believe Merlo's testimony. If even one juror had believed Merlo's testimony, the jury could not have found the existence of the facts that here showed intent beyond a reasonable doubt.

This case was well tried. The evidence shows this was a planned, deliberate murder. Merlo had a .38 caliber pistol. He showed that pistol to his wife's sister. He left a .38 caliber bullet as a warning on his wife's car seat. Then he moved to Ohio, sold the .38, and he bought a .32. He rented a car and drove from Niles, Ohio to Detroit, Michigan after work on Friday evening. He shot his wife four times the next morning and eluded capture for about three weeks. His voluntary statement to police omitted any and all reference to what he would offer at

trial as his defense. The testimony of eyewitnesses did not corroborate a single point of Respondent's defense. No rational juror could have concluded that Respondent lacked a premeditated and deliberate intent to kill. The *Sandstrom* violation committed at this trial was harmless beyond a reasonable doubt.

In *Francis* v *Franklin*, 471 US __; 105 S Ct 1965; 85 L Ed 2d 344 (1985), the Court found an instruction which shifted the burden of proof to the defendant to be violative of *Sandstrom*. The court below had found that the *Sandstrom* violation could not have been harmless error. The defense was accident, and the evidence of intent was not overwhelming. This Court affirmed the Court of Appeals on the harmless error question, noting that "[t]he primary task of this Court upon review of a harmless error determination by the Court of Appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis* v *Franklin*, 85 L Ed 2d at 361, n 10. It does not appear from the Sixth Circuit's opinion that the court "undertook a thorough inquiry" into the evidence. The opinion merely recites the evidence and calls it "balanced" despite the lack of corroboration of Merlo's testimony and the existence of testimony that disputes Merlo's claimed intoxication and provocation. The Sixth Circuit's "analysis" is incorrect under *Rose* v *Clark*, *supra*.

> We agree that the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court. See id., at __, 92 L Ed 2d 480-481. Harmless error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?
>
> *Rose* v *Clark*, 92 L Ed 2d 473, n 11.

In addition to a thorough review of the evidence of intent, Petitioner contends that the record should be examined in other respects as well. Whatever instructions were given to the jury should be reviewed and the *Sandstrom* instruction must be viewed in the context of all the instructions that were given. *Cupp* v *Naughten*, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1973).

The instruction given in the instant case which was found to violate *Sandstrom* is:

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, *unless the contrary appears from the evidence*, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that death of the deceased was designed by the slayer, *unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely*. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used.
>
> (R, 601-602)

The italicized portions of the instruction condition the finding of guilt upon a review of the evidence. Petitioner

contends these italicized portions are rhetorically inconsistent with the constitutionally infirm portions of the instruction. *Sandstrom*, 442 US 518, n7. These conditional clauses cut in favor of finding the *Sandstrom* violation to be harmless error beyond a reasonable doubt. These conditional clauses guarantee that the jury found the predicate facts constituting intent.

The Sixth Circuit never considered the full instruction to the jury in the instant case. This instruction included intoxication and its potential to preclude the formation of the necessary intent. (R, 600-601, 605) The trial court instructed the jury on provocation and how it reduces murder to manslaughter. (R, 599-600) The jury was instructed that the burden of proof was on the prosecutor to establish guilt beyond a reasonable doubt. (R, 596) The trial court, after defining common law murder, instructed the jury:

> If you come to the conclusion that the Respondent is guilty of murder, as I have defined it, it will be your duty to determine whether he is guilty of murder in the first or murder in the second degree. The difference between murder in the first degree and murder in the second degree is this: Murder in the first degree is a killing done wilfully and with premeditation, while in murder in the second degree the element of premeditation is absent. To convict the Respondent of murder in the first degree, it must appear that the killing was wilful and premeditated. It is not necessary that any definite period of time should have elapsed between the forming of such intention and the shooting which killed deceased, provided the shooting was premeditated and the Respondent acted wilfully.

> On the other hand, if the killing was done under a sudden impulse, without premeditation or previously formed intention, the offense would be murder in the second degree. As I have stated before, the difference between the two offenses is that, in murder in the first degree the element of premeditation is present, while in murder in the second degree it is not.
>
> (R, 597-598)

In *Francis* v *Franklin, supra,* Justice Powell wrote a dissenting opinion. Justice Rehnquist, with whom Chief Justice Burger and Justice O'Connor joined, also dissented. Both dissents examined the challenged instruction in the context of all the instructions as a whole. Both dissents found that the other instructions prevented the challenged instruction from impermissibly shifting the burden of proof to the defendant. The dissenting opinions held the challenged instruction consequently did not violate *Sandstrom* v *Montana, supra.*

In the instant case, the type of analysis used in the dissenting opinions of *Francis* v *Franklin, supra,* applied to the whole jury instruction in the instant case, will result in a finding that the *Sandstrom* violation was harmless beyond a reasonable doubt.

The Sixth Circuit applied *Rose* v *Clark* incorrectly. This Court should grant this petition for a writ of certiorari and hold the *Sandstrom* violation was harmless beyond a reasonable doubt.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgment of the United States Court

of Appeals for the Sixth Circuit, or, in the alternative, summary reversal of the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

L. BROOKS PATTERSON (P18708)
PROSECUTING ATTORNEY
OAKLAND COUNTY

ROBERT C. WILLIAMS (P22365)
CHIEF, APPELLATE DIVISION

By: /s/ MARGARET G. HORENSTEIN (P30263)
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DATED: November 13, 1986

APPENDICES

• • •

APPENDIX A

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed September 18, 1986)

(JOHN MERLO, Petitioner-Appellee, v. DAN L. BOLDEN, Respondent-Appellant — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 86-1118)

Before: KEITH and MERRITT, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge.

The Oakland County Prosecutor appeals from an order of the district court granting petitioner John Merlo's petition for a writ of habeas corpus. The district court found that Merlo's conviction for murdering his wife was obtained through a jury instruction which impermissibly shifted the burden of proof on the element of *mens rea* in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). For the reasons that follow, we affirm.

I.

On January 13, 1984, petitioner John Merlo filed a petition for a writ of habeas corpus alleging denial of effective assistance of counsel and violation of due pro-

cess and the right to a fair trial with respect to five specific jury instructions. On December 20, 1967, Merlo was convicted of first-degree murder and sentenced to life imprisonment without possibility of parole. The conviction was affirmed, *People* v. *Merlo*, 23 Mich. App. 694 (1970), and, in 1975, a delayed application for leave to appeal was denied by the Michigan Supreme Court. At this point the alleged *Sandstrom* error on which the district court granted relief had not been raised. In 1977, Merlo filed a petition for writ of habeas corpus in federal district court but was unsuccessful.

The *Sandstrom* issue was first raised in Merlo's delayed motion for new trial on November 4, 1982, which was denied. On June 13, 1983, the Michigan Court of Appeals denied leave, and, on December 29, 1983, the Michigan Supreme Court denied leave to appeal.

At his trial, petitioner Merlo did not contest the fact that he shot his wife four times in the beauty shop where she was working. As defense counsel stated in a pretrial motion, "the facts are such that the shooting is hard to be denied, and the defense must be that there was no premeditation." In his opening statement, defense counsel indicated that defendant's defense would be lack of premeditation.

Rose Marie Schmidt, a beauty shop customer, saw petitioner Merlo arrive at the beauty shop. Merlo and his estranged wife, Sharon, a hairdresser, went into the furnace room, located at the back of the beauty shop. According to Rose Marie, the doors to the furnace room were open and Merlo and his wife remained in the room for about five minutes. Rose Marie was five feet from the open doors but she did not hear any sounds. Sharon walked out of the room first and went to work on another customer. Rose Marie then saw Merlo walk out and shoot Sharon, firing two of the shots after Sharon

was on the floor. Rose Marie observed that Merlo's gait was normal as he walked from the furnace room.

Another customer, Diane Brennan, also saw Merlo walk into the shop and go into the back room with his wife. Diane tried to listen to their conversation, but Merlo and his wife were very quiet. Diane also saw Merlo shoot his wife. She observed that Merlo was three to four feet from the victim, used a chrome pistol, and never said a word.

Andrea Pojarski was a hairdresser in the shop. She saw Merlo come in and exchanged casual greetings with him. Andrea heard Sharon ask him, "What are you doing here? Why don't you go home?" Andrea saw Sharon come out of the back room but did not see petitioner come out right after Sharon. Andrea heard the shots but did not watch the shooting.

Martha Stanfield owned the beauty shop. She knew Merlo and saw him come in. Although Merlo motioned for Sharon to come to the back room nothing appeared unusual. Prior to Merlo's arrival, Sharon had spilled water on the floor. Martha went into the back room while Merlo and Sharon were there to get towels. Merlo and Sharon were just standing there. At one point, Sharon came out of the back room, got a cigarette, and returned to the back room. Martha only heard Sharon use the word "car." Martha described Merlo's behavior that day as normal, quiet and courteous. She did not see any spit on Merlo's face nor any slap marks. Martha testified that police detectives were watching the beauty shop for a few weeks prior to the murder because Merlo had threatened to come to the shop and kill himself.

Sharon's customer, Lois Whitaker, also saw Merlo come in the door. After Sharon and Merlo had been in the back room, Sharon came out first and began

working on Lois. Then Merlo came out of the back room and was two feet from Lois's chair when he began shooting Sharon. According to Lois, Sharon started slumping and Merlo shot some more. When Merlo stood in front of Lois's chair, she observed that his arm was extended and the gun was in his hand. She saw no marks nor any spittle on Merlo's face. Lois further testified that she had heard a story that Merlo had put a bullet on the seat of Sharon's car about three weeks before the shooting.

Bank detective Frank Morris, who apprehended Merlo in Philadelphia, testified that Merlo laughed and stated, "[t]he papers quote me as a nonchalant killer." Merlo confessed that on the day of the murder he drank whiskey at a bar from 10 to 11 a.m., then went to the beauty shop where he talked to his wife "trying to get her to go back with him."

Robert Payton testified that he was seeing Sharon Merlo prior to the birth of her son, and, in October 1966, four weeks after the birth. After Sharon filed for divorce, Payton saw her a few times a week, picking her up at her parents' house. Sharon told Payton that Merlo had threatened to go to the beauty shop and shoot himself.

Diane Wilshire, Sharon's sister, testified that Merlo visited her in the hospital in December 1966, and that he had a gun with him. She also testified that Merlo once hit Sharon, breaking her glasses.

John Merlo gave the following testimony at the trial. He and Sharon were married in April 1966, and their son was born in September of that year. On October 13, 1966, he and Sharon had an argument and Sharon threw him out of the house, which was her mother's. On October 29, Sharon and John went to a drive-in where

Sharon told John she wanted a divorce. Apparently, Merlo returned to the house and was thrown out again on November 5. On November 7, Merlo saw Payton and Sharon "necking" in a parked car in front of the house. Merlo confronted the two and told Sharon, "no dating." Merlo had returned to his car and was slowly pulling away when Sharon ran up to the car, reached in the window, and slapped Merlo. Merlo then stopped the car and chased Sharon. When he caught her he "slapped her a couple times," breaking her glasses.

Merlo left for his hometown of Niles, Ohio, but returned to Michigan on December 14, with a gun. He visited Sharon's sister in the hospital and told her that he would use the gun on himself if he did not get Sharon back. Merlo then called his mother-in-law and told her that he was going to go to the beauty shop and kill himself if he did not get Sharon back. Merlo next went to Payton's apartment looking for Sharon and Payton. They were not there, but Merlo waited in the parking lot for them to return. While waiting, he saw Sharon's car at a nearby gas station. Merlo smashed the dashboard of the car and pulled out the spark plug wires. Merlo testified that he did not place a bullet on Sharon's car seat at that time, but that one just flew out when he was smashing the dashboard with his gun.

On January 6, 1967, Merlo went to the bar next to the beauty shop and had about eight drinks. He then went into the beauty shop, intending to shoot himself if Sharon would not come back to him. Sharon refused to go back to Merlo and told him "why don't you leave," and "get out of here, punk." Sharon complained about what Merlo did to her car, spit in his face, shoved him up against the wall, and said "get the hell out of here, punk. Get out of my life." Merlo testified that when he

shot his wife he was in a rage and that part of the reason he killed her was because she had a boyfriend.

Merlo's mother-in-law, Lillian Kamen, testified as a rebuttal witness that after the killing Merlo called her and said "I'm not sorry I did it. I warned her ahead of time. I left a bullet in the front seat." Kamen also testified that Merlo had called her previously and told her he planned to go to the beauty parlor and kill himself.

After both sides had rested, the defense sought to have the case dismissed on the ground that there was insufficient evidence of premeditation. The defense counsel told the court "that the Defendant's position in this case was that he had had enough to drink where he wasn't in full control of his facilities and that further that when she spit in his face, that he lost his head and was provoked into such a state of mind that he didn't have enough time to control this excited mind and walked right behind her to where she sat down and got shot." The court denied the motion for dismissal.

The trial court subsequently gave the following jury instruction, which the parties agree violates the rule of *Sandstrom* v. *Montana:*

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then *it will be presumed that death of the deceased was designed by the slayer,* unless the facts and circumstances of the killing, or the evidence, create a

> reasonable doubt whether the killing was done purposely. (Emphasis added).

On January 27, 1985, the district court granted Merlo's petition for a writ of habeas corpus. The district court found that this instruction violated due process under *Sandstrom* and found that, because Merlo's sole defense was lack of intent, the error was not harmless. Respondent appealed and, on September 1, 1985, we remanded the case to the district court to determine whether Merlo was barred from maintaining this action due to a procedural default. In our unpublished opinion we stated that "[c]ounsel for the State conceded at oral argument that the . . . jury instruction . . . is unconstitutional," and concluded that "[c]ounsel's concession leaves as the major issue on appeal the question" of procedural default. *Merlo* v. *Bolden*, No. 85-1145 (6th Cir. Sept. 17, 1985). On December 27, 1985, the district court ordered the writ granted, holding that the state had never raised the issue of procedural default in the state courts but instead had addressed the issue solely on the merits.

II.

The state argues that Merlo's failure to raise the *Sandstrom* issue on direct appeal in the state courts should bar him from raising the issue now absent a showing of cause and prejudice. It is clear that a petitioner must demonstrate cause and prejudice when a state court denies relief due to procedural default. *Gilbert* v. *Parke*, 763 F.2d 821, 824 (6th Cir. 1985). Further, "where the state argues both the merits and the procedural default in its state court brief and where the state court decision does not indicate whether the court relied upon the procecdural default, the procedural

default must be regarded as a substantial basis of the state court's decision." *Id.*

In this case, however, the district court found that "respondent concedes that the prosecutor did not expressly raise the procedural default issue in his responsive brief before the Michigan Court of Appeals or the Michigan Supreme Court." Accordingly, the district court properly concluded that since procedural default was not argued in the state courts, the state courts denied relief based on the merits of Merlo's claims. The state, by failing to assert procedural default, waived the right to assert it as an independent ground to support Merlo's conviction. We discern no error in the district court's analysis.

III.

The dispositive questions in this case are whether a *Sandstrom* error can ever be considered harmless when the defendant has contested the element of intent, and, if so, whether the *Sandstrom* error in the present case was in fact harmless.[1] The recent Supreme Court decision of *Rose* v. *Clark*, 106 S. Ct. 3101 (1986) is dispositive on the former question and instructive on the latter.

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[1] Two subsidiary issues are raised by the parties. First, Merlo argues that all issues with respect to the appeal except for the procedural default issue were decided by the panel which first heard the case. This argument can be rejected because the panel never discussed whether the *Sandstrom* error was harmless or not, and the issue of procedural default appropriately precedes such consideration. Second, the State argues that *Sandstrom* should not apply retroactively to cases in which the judgment and all direct appeals were final by the date of *Sandstrom*. At the same time, the State recognizes that we have given *Sandstrom* full retroactive effect. "Retroactive application of *Sandstrom* has been recognized in this Circuit since the instructional error would normally affect a defendant's right to a fair trial and impact upon the ultimate issue of innocence or guilt." *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir.), *cert. denied*, 462 U.S.

(*concluded on page A-9*)

In *Rose*, the Court resolved the question which it had failed to resolve in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983): "whether the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Francis* v. *Franklin*, 471 U.S. __, 105 S. Ct. 1965, 85 L.Ed.2d 39 (1985)." *Rose*, 106 S. Ct. at 3103 (footnote omitted). The court reviewed the general principle first recognized in *Chapman* v. *California*, 386 U.S. 18 (1967), "'that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt,'" *id.* at 5025 (quoting *Delaware* v. *Van Arsdall*, 475 U.S. __, __, 106 S. Ct. 1431, 1436 (1986)), and noted that this principle had been applied to myriad constitutional errors. The Court further recognized, however, that there are certain constitutional errors which render a trial so fundamentally unfair that they necessarily require reversal without regard to the evidence in the record.[2] However, those errors, as the Court explained, "are the exception and not the rule." *Rose*, 106 S. Ct. at 3106. The Court observed that the purpose of many criminal trial rules is to ensure a fair trial and concluded that "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable

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(*continued from page A-8*)

1121 (1983) and cases cited therein. Subsequent cases have applied *Sandstrom* retroactively. *Logan* v. *Abshire*, 778 F.2d 283 (6th Cir. 1985); *Martin* v. *Foltz*, 773 F.2d 711 (6th Cir. 1985). In light of our Circuit precedent on this issue, we have no occasion to reconsider the retroactivity of *Sandstrom*.

[2] Examples of such errors include the use of a coerced confession, *Payne* v. *Arkansas*, 356 U.S. 560 (1958), the complete denial of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and the denial of trial by an impartial judge, *Tumey* v. *Ohio*, 273 U.S. 510 (1927). *See Chapman*, 386 U.S. at 23 n. 8.

doubt, the interest in fairness has been satisfied and judgment should be affirmed." *Id.* at 3107.

The Court found that a *Sandstrom* error is not the kind of error that automatically requires reversal and therefore found "that the error at issue here -- an instruction that impermissibly shifted the burden of proof on malice — is not 'so basic to a fair trial' that it can never be harmless." *Id.* The Court accordingly held that the *Chapman* harmless error standard applies to all cases involving *Sandstrom* errors.[3]

In so holding, the Court rejected the approach which this court had taken in the decision below. In *Clark* v. *Rose*, No. 84-5744 (6th Cir. April 1, 1985), we held that because the defendant had contested the issue of intent at trial, the *Sandstrom* error could not be harmless. *See Rose*, 106 S. Ct. at 3105. For support for this proposition, we relied on Circuit precedent, namely, *Engle* v. *Koehler*, 707 F.2d 241, 246 (6th Cir. 1983), *aff'd by an equally divided Court*, 466 U.S. 1 (1984). *Id. Engle* held that certain *Sandstrom* errors could be harmless and set forth the following analysis:

> If the defendant acknowledges that an intentional, malicious killing occurred and only claims nonparticipation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea*, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial.

Engle, 707 F.2d at 246. This analysis was based on *Conway* v. *Anderson*, 698 F.2d 282 (6th Cir.), *cert. denied*,

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[3] The Court did not conclude that all *Sandstrom* errors are necessarily harmless. It merely concluded that the traditional *Chapman* harmless error analysis may be applied to determine whether an erroneous *Sandstrom* instruction is in fact harmless under the circumstances.

462 U.S. 1121 (1983) (observing the extremely prejudicial effect of a *Sandstrom* error where the defendant challenged the element of *mens rea*), and was approved in *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985) (finding a *Sandstrom* error to be harmless because the *sole* question at trial was whether the defendant was a participant in the crime).

The Supreme Court in *Rose* expressly rejected this court's analysis in vacating our decision. The Court stated:

> our harmless cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." . . . The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." . . . Thus, the fact that respondent denied that he had "an intent to do any injury to another," . . . does not dispose of the harmless error question.

Rose, 106 S. Ct. at 3109 (citations omitted).

Thus, to the extent that *Conway*, *Engle* and *Martin* instruct that a *Sandstrom* error cannot be harmless where a defendant challenges the element of *mens rea*, they are modified by *Rose* and no longer represent the correct statement of the law in this Circuit. In light of *Rose*, our determination of whether a *Sandstrom* instruction is harmless will no longer be "largely a function of the defense asserted at trial." *Engle*, 707 F.2d at 246; *see also Conway*, 698 F.2d at 285. Rather, we will apply the traditional *Chapman* harmless error analysis to determine whether the record, examined in its entirety, establishes

guilt beyond a reasonable doubt. The specific inquiry in a *Sandstrom* case will be "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Connecticut* v. *Johnson*, 460 U.S. 73, 97 n. 5 (1983) (Powell, J., dissenting) (approved in *Rose* v. *Clark*, 106 S. Ct. at 3109).

Applying this standard to the present case, we cannot say that the instant *Sandstrom* error was harmless beyond a reasonable doubt. Merlo was convicted of first degree murder which proscribes "wilful, deliberate and premeditated murder." Mich. Comp. Laws Ann. § 750.316. Merlo's theory at trial was that he had gone to the shop to shoot himself, had made prior threats to shoot himself in the shop, and, in a drunken condition, was incited to shoot his wife by her verbal and physical abuse. Merlo introduced evidence at trial to support this theory. The state's theory, also supported by the evidence, was that Merlo had previously abused his wife, had left a bullet in her car as a warning, was jealous of her relationship with her new boyfriend, and shot her with the requisite intent of premeditation. Of course, the mere fact that Merlo disputed the element of intent is not dispositive. However, the evidence is in such a balanced state that we cannot say beyond a reasonable doubt that it "was so dispositive of intent . . . that the jury would have found it unnecessary to rely on the presumption" created by the erroneous *Sandstrom* instruction. *Connecticut* v. *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting). We therefore cannot conclude that the *Sandstrom* error was harmless.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division — Flint)

(Filed December 27, 1985)

(JOHN MERLO, Plaintiff-Appellee, v. DAN BOLDEN, Defendant-Appellant — NO: 84-CV-[8]023-FL)

Before the Court are the parties' supplemental briefs on the procedural default issue which is the only remaining issue in this action. The basic "ground rules" which guide the Court in analyzing this issue were fully set forth by the Sixth Circuit Court of Appeals in *Meeks* v. *Bergen*, 749 F.2d 322 (6th Cir. 1984). In *Meeks*, the Court recalled that in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977),

> The Supreme Court held that a defendant who failed to comply with state rules of procedure governing the timely presentation of federal constitutional claims forfeited the right to federal habeas corpus review of those claims absent a showing of 'cause for noncompliance [with state procedure] and some showing of actual prejudice resulting from the alleged constitutional violation.'

The Court went to note that:

> *Sykes*, however, does not bar federal habeas corpus relief merely upon a showing that an adequate procedural ground was available to support a conviction; rather *Sykes* mandates that it must

> be demonstrated that the state court had *relied* upon a procedural default. Where a state appellate court did not rely on the procedural default, but reached the merits of a claim, the *Sykes* bar is inapplicable. The rationale of this rule requires that in instances where the state courts themselves decline to honor a procedural bar, the federal courts do no damage to precepts of comity and federalism by similarly addressing the merits of a claim.

Meeks at 325 (citations omitted.)

Finally, the Court restated its holding in *Raper* v. *Mintzes*, 706 F.2d. 161 (6th Cir. 1983), which set forth the standard to be applied in determining if the state court relied upon a procedural default where the basis of the state court's decision is unclear.

> Where the basis for the state court's decision is unclear, we believe that the federal habeas court must look to the arguments presented to the state court. *See, Martinez* v. *Harris*, 675 F.2d. 51 (2d Cir. 1982). In *Martinez*, the Second Circuit announced the following rules for ascertaining the basis of the state court's decision: (1) if the state prosecutor only argued the merits of the petitioner's claim before the state court and failed to raise the procedural default issue, the federal court may assume that the state court ruled only on the merits; (2) if the prosecutor relied solely on the procedural default, the federal court may assume that that was the only basis for the state court's decision; and (3) if the prosecutor argued in the alternative, the federal court may assume that the state court did not rely solely on the merits unless it says so. *Id.* at 54-55.

Meeks, at 325-26.

As set forth in this Court's original Memorandum Opinion and Order, the procedural history of this case is as follows: Petitioner was convicted of first degree murder, MCLA § 750.316, on December 20, 1967, following a jury trial in the Circuit Court for the County of Oakland. The Michigan Court of Appeals affirmed his conviction on his appeal as of right on May 25, 1970 in a published opinion, *People* v. *Merlo*, 23 Mich.App. 694 (1970). Petitioner's delayed application for leave to appeal to the Michigan Supreme Court was denied October 27, 1975. Petitioner filed an application for a writ of habeas corpus in 1977 which did not raise any of the issues contained in this application. On November 4, 1982, petitioner's delayed motion for a new trial raising the six issues he seeks to present in this habeas corpus application was denied. The Michigan Court of Appeals denied his delayed application for leave to appeal on the same six issues in an order dated June 17, 1983 which stated:

> In this cause a delayed application for leave to appeal is filed by defendant-appellant, and an answer in opposition thereto by the Court,
>
> IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

The Michigan Supreme Court denied his late application for leave to appeal on the same six issues in the following order dated December 29, 1983.

> On order of the Court, the delayed application *in propria persona* for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Obviously, this Court must apply the *Raper* standard to determine whether the state appellate courts relied upon a procedural default. The respondent concedes that the prosecutor did not expressly raise the procedural default issue in his responsive brief before the Michigan Court of Appeals or the Michigan Supreme Court. Instead, the respondent argues that the prosecutor raised the procedural default issue by implication on page 6 of the brief in response to petitioner's delayed application for leave to appeal to the Michigan Court of Appeals. Respondent points to the following language which addresses petitioner's ineffective assistance of counsel claim.

> In the instant case, the applicable prong of the two part *Garcia* test is that a (sic) mistake. Therefore, because of the overwhelming evidence of Defendant's guilt, it cannot be said that but for *trial counsel's request that these instructions be given*, Defendant would of (sic) had a reasonably likely chance of acquittal.

Respondent's argument does not support his assertion. Actually, respondent is claiming that since petitioner's counsel requested the unconstitutional instructions, it would be illogical for the prosecutor to raise the argument that the failure to object to the instructions waives petitioner's rights to challenge them on appeal. Instead of implicity raising the procedural default defense, this argument asserts that procedural default is not even applicable. As such, it clearly misses the point. First, if such is actually the case, the state has no more business arguing procedural default here than the prosecutor had in the state appellate courts. Second, the court sees no difference between a situation where defendant requests the instruction, and therefore does not object, and where defendant agrees with the instruction requested

by the prosecution and therefore does not object. In either situation, it is the *failure to object* which favors the basis of the procedural default concept.

Finally, the record before this Court does not support the respondent's claim that petitioner's trial counsel requested the constitutionally infirm instructions, rather, the record merely reveals that the instructions were read without objection. (Trial Tr. pp. 601-06) Accordingly, this issue should be treated as, and indeed actually is, a procedural default issue. Therefore, the Court concludes (1) that the prosecutor could have raised the procedural default issue in the state courts, (2) that he failed to do so, choosing instead to deal with the merits of the case. Having so concluded, the court can assume under *Raper* that the state courts ruled only on the merits. Accordingly, *Wainwright* v. *Sykes* does not apply to the instant action. Because it has already been determined that the instructions at issue here are unconstitutional under *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir. 1983) and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), petitioner's request for a writ of habeas corpus is hereby GRANTED, and a conditional writ of habeas corpus shall be issued allowing the State of Michigan 90 days to begin a new trial. If the state does not do so, petitioner shall be unconditionally released at that time.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: December 27, 1985

APPENDIX C

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals for the Sixth Circuit)

(Filed September 17, 1985)

(JOHN MERLO, Petitioner-Appellee v. DAN BOLDEN, Respondent-Appellant — ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN; No. 85-1145)

Before: MERRITT and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge.

This is a Michigan habeas corpus case based on a jury conviction in 1967 for first degree murder. The defendant shot and killed his estranged wife. His defense was sudden impulse and lack of premeditation; he admitted the facts of the killing. In his petition, he argues that the jury instruction on presumed intent improperly shifted the burden of persuasion. He did not object to the instructions at trial, on direct appeal, or in an earlier habeas corpus petition or delayed motion for a new trial. The District Court granted the defendant's conditional writ of habeas corpus requiring the State to commence trial within 90 days. The state appeals.

Counsel for the State conceded at oral argument that the following jury instruction, as the District Court found, is unconstitutional under the rule of *Conway* v.

Anderson, 698 F.2d 282, 284 (6th Cir.), *cert. den.*, 103 S.Ct. 3092 (1983), and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979):

> *The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts*, and if, a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then *it will be presumed that death of the deceased was designed* by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, *the law presumes that such person so assaulting intended to take life*. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used. (Emphasis added.)

(Transcript, Vol II, pp 601-602.)

Counsel's concession leaves as the major issue on appeal the question whether a Michigan procedural default rule bars consideration of defendant's habeas corpus claim because of the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U.S. 72 (1974).

In the court below the state extensively briefed and defended on the basis of the *Wainwright* doctrine. Without mentioning or discussing this defense, the District Court issued the writ. On appeal, the state con-

cedes the correctness of the District Court's *Sandstrom* holding but takes issue with the result on the *Wainwright* question which the District Court did not discuss or pass on.

Since the District Court has not passed on this procedural default issue under *Wainwright* the case must be remanded to the District Court for consideration of this issue in light of Michigan law concerning procedural default, as well as consideration of any factual issues arising under *Wainwright*'s "cause and prejudice" standard.

Accordingly, it is so ORDERED.

ISSUED AS MANDATE: October 23, 1985
COSTS: NONE

(Certification Omitted)

APPENDIX D

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division — Flint)

(Filed January 28, 1985)

(JOHN MERLO, Petitioner, v DAN BOLDEN, Respondent — NO: 84-CV-8023-FL)

I

Petitioner John Merlo, a prisoner at the Kinross Correctional Facility at Kincheloe Airforce Base, Michigan, has brought this application for a writ of habeas corpus pursuant to 28 USC § 2254. He was convicted at a jury trial on December 20, 1967 in the Circuit Court for the County of Oakland of first-degree murder, MCL 750.316. The Michigan Court of Appeals affirmed his conviction on his appeal as of right on May 25, 1970 in a published opinion, *People* v *Merlo*, 23 Mich App 694 (1970). Petitioner's delayed application for leave to appeal to the Michigan Supreme Court was denied on October 27, 1975. (Court of Appeals Docket No. 5278.) Petitioner filed an application for a writ of habeas corpus in 1977 which did not raise any of the issues contained in this application.

On November 4, 1982, petitioner's delayed motion for a new trial (raising the six issues he seeks to present in this habeas corpus application) was denied. The Michigan Court of Appeals denied his delayed application for leave to appeal on the same six issues in an order dated June 17, 1983. (Docket No. 68975.) The Michigan Supreme Court denied his late application for leave to appeal on

the same six issues in an order dated December 29, 1983. (Docket No. 72007.) Petitioner filed the instant application for writ of habeas corpus on January 13, 1984.

II

The following issues are raised:

A. Petitioner was deprived of a fundamentally fair trial by the jury instruction that the law presumes every person intends the natural consequences of his conduct.

B. Petitioner was deprived of a fundamentally fair trial by the jury instruction that the law presumes an intent to murder from the use of a deadly weapon.

C. Petitioner was deprived of a fundamentally fair trial by the jury instruction that the jury must acquit petitioner of first-degree murder before considering lesser offenses.

D. Petitioner was deprived of a fundamentally fair trial by the jury instruction that malice may be implied from the doing of a cruel act.

E. Petitioner was deprived of a fundamentally fair trial where the jury instructions taken as a whole shifted the burden of proof unto the defendant.

F. Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel.

Petitioner alleges that he was deprived of a fundamentally fair trial by the trial court's use of unconsititutional presumptions in instructing the jury on the issue of intent. The prosecution must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 US 358 (1970), petitioner was charged with first-degree

murder, MCL 750.316. Under Michigan law, first-degree murder has a specific intent element known as "malice aforethought." *People* v *Johnson*, 93 Mich App 667, 287 NW2d 311 (1979).

The element of intent ". . . cannot be taken from the trier of fact through reliance on a legal presumption . . ." *Sandstrom* v *Montana*, 442 US 510, 523 (1979).[1] This type of presumption is constitutional error whether it is conclusive on the issue of intent or simply transfers the burden of proof to the defendant. *Sandstrom*, at 524; *Burton* v *Bergman*, 649 F2d 428, 431 (CA 6, 1981), *vacated and remanded on other grounds*, 456 US 953 (1982).

In petitioner's case, the jury was told,

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that death of the deceased was designed by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated

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[1] *Sandstrom* has been given retroactive effect by the Sixth Circuit. *Williams* v *Engle*, 683 F2d 152 (CA 6, 1982), *Krzeminski* v *Perini*, 614 F2d 121 (CA 6), *cert den'd*, 449 US 866 (1980).

> and likely to produce death, or serious bodily injury from the manner in which it is used.

(Transcript, Vol II, pp 601-602).

The above instruction is, with the exception of the last sentence, identical to the one which was found violative of *Sandstrom* in *Conway* v *Anderson*, 698 F2d 282, 284 (CA 6), *cert den'd*, __ US __, 103 S Ct 3092 (1983). Accordingly, for the reasons set forth in *Conway*, the Court must conclude that the instruction given in the instant case is constitutionally infirm.

This does not end the analysis, however, since *Sandstrom* instructions are subject to the harmless error rule.[2]

"A *Sandstrom* instruction can be deemed 'harmless' only if no rational juror could have concluded from the evidence of record that the perpetrator of the crime lacked the requisite intent." *Conway*, at 285. "Harmless error" analysis must rest upon the particular facts of record in the defense asserted. *Id*, *cf*. *Krzeminski* v *Perini*, *supra* (defendant admitted the "element" upon which the erroneous instruction was based). Where the asserted defense is lack of intent, a *Sandstrom* instruction has been error simply because the instruction "may have relieved the state of its obligation" even though the proof of intent was substantial. *Burton* v *Bergman*, *supra*. General instructions requiring the jurors to find all elements of the crime beyond a reasonable doubt will not cure a *Sandstrom* error. *Phillips* v *Rose*, 690 F2d 79, 81 (CA 6, 1982). *Contra*, *Roberts* v *Marshall*, 736 F2d 1126 (CA 6, 1984).

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[2] In *Connecticut* v *Johnson*, 460 US 73 (1983), the Supreme Court divided equally on the issue of *Sandstrom*, instructions being treated as "harmless error." Since *Connecticut* v *Johnson*, this circuit has continued to follow its "harmless error" rule set out in *Conway* v *Anderson*, *supra*.

Petitioner's sole defense in this case was indeed "lack of intent." During voir dire, defense counsel said, "the defense *must* be that there was no premeditation." (Tr. Vol I, p. 99). A motion to dismiss after the prosecution's opening statement was based on lack of intent. (Tr. Vol I, p. 107). Defense counsel renewed the motion to dismiss at the close of the prosecutor's proofs. (Tr. Vol I, pp. 371-375).

Defense counsel gave an opening statement which admitted the "killing" but claimed a lack of premeditation. (Tr. Vol II, p. 381). Petitioner testified that he had no intention of killing his wife when he went to her place of employment. (Tr. Vol II, p. 545). Petitioner also testified that before going to see his wife he consumed eight shots of whiskey with beer chasers. (Tr. Vol II, pp. 457, 545-548). Petitioner further claimed that his wife's slapping and spitting on him caused him to go into a "rage." (Tr. Vol II, p. 464). Defense counsel made still another motion to dismiss for lack of intent at the close of his own proofs. (Tr. Vol II, pp. 563-564). Finally, defense counsel's closing argument centered on intent: "I submit that he could not have formed the intent. He could not have premeditated this killing." (Tr. Vol II, p. 564).

While the proof in this case that petitioner murdered his estranged wife is strong, "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v *Naughton*, 414 US 141, 147 (1973); *Henderson* v *Kibbe*, 431 US 145, 154 (1977); *Engle* v *Koehler*, 707 F2d 241, 244-245 (CA 6, 1983); *Phillips* v *Rose*, 690 F2d 79, 81 (CA 6, 1982). [3]

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[3] In light of the Court's rulings, petitioner's remaining claims need not be addressed.

III

Petitioner asked to be relieved "of the unconstitutional restraint upon his liberty." A federal court may use its habeas corpus authority to accomplish justice in its order of relief. *Peyton* v *Rowe*, 391 US 54, 66 (1968). The ends of justice will be met by a conditional writ of habeas corpus being issued allowing the State of Michigan to commence a new trial within ninety days. If the state does not do so, petitioner shall be unconditionally released at that time.

For the foregoing reasons, a conditional writ of habeas corpus will issue. An appropriate order may be entered.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: January 28, 1985

EDITOR'S NOTE

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CASE NO. 86-832

SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM 1986

DAN L. BOLDEN,

Petitioner,

-vs-

JOHN MERLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

John Merlo, the Respondent in this cause, entered the beauty shop where his wife worked and spoke to her in the furnace room for about five minutes. (Preliminary examination -21) (Tr. 114, 176). John went to the Crest Beauty Shop where Sharon Merlo was employed for the purpose of an attempt at reconciliation of the relationship with the wife and baby that he loved. (Tr. 331(9), 390, 455, 458, 464, 485). Testimony indicated that John Merlo previously threatened to go to the beauty shop and "blow his brains out." (Tr. 361-369, 373, 375, 384, 404, 450, 561, 583).

If unsuccessful at reconciliation Mr. Merlo was going to kill himself then and there. (Tr. 458, 464). Mr. Merlo had walked through the beauty shop and into the back furnace room in a normal manner (Preliminary examination-54) (Tr. 243). Afterwards his wife walked out of the furnace room to the work area and John Merlo then came out and shot his wife. (Tr. 115). There is some testimony that John Merlo's stride as he walked out of the furnace room was normal. (Tr. 115). Other testimony indicates that he walked out in a quick manner before the shooting (Preliminary examination-47). There was only a three foot distance so he couldn't actually run (Preliminary examination-47). John followed Sharon out of the furnace room as she left. (Tr. 262). Mrs. Merlo was shot almost immediately as she returned to her work area. (Tr. 264). Shots were fired so fast that witnesses only heard three of the four shots. (Preliminary examination-12, 28, 39, 57) (Tr. 115, 168, 246). Witnesses could have been 15 to 30 feet from the furnace area where the Merlo's were located. (Tr. 136, 174). One witness testified that if there was talking above normal conversation she wouldn't have heard it anyway and there is nothing wrong with her hearing. (Tr. 137-138). Two of the witnesses were only partially paying attention to the furnace room where the Merlo's were having their discussion. (Tr. 176).

Defense counsel's opening statement implied that he did not have enough time to prepare defendant's case because he was appointed less than four weeks prior due to "certain problems" with other attorneys appointed to represent Mr. Merlo. (Tr. 378-379). Defense counsel later admitted to the jury that he had not initially developed a theory or a defense in the case. (Tr. 380).

Mr. Merlo carried a gun on and off since he was honorably discharged from the army. (Tr. 382, 390, 420, 446-447). His home town was in Ohio where it was legal to have a gun without a permit. (Tr. 390, 455-456). When he left Ohio for Michigan to talk with his wife at the beauty shop he took the gun with him.

(Tr. 390, 455). The conversation in the furnace room was basically a plea by John, in a calm voice, that his wife return to him. (Tr. 391). Mrs. Merlo was well aware of John's threat to shoot himself at the beauty shop and other persons were made aware by Mrs. Merlo herself. (Tr. 361-369). Nevertheless, Sharon told John to get out of her life, called him names, spit in his face, and shoved and slapped him. John lost control of himself, followed her out, and killed her rather than himself. (Tr. 391, 461, 463).

There is some evidence that John slapped his wife at one time (Tr. 414), but only in response to her initial beating of him. (Tr. 444, 445, 509). He had never hit her before. (Tr. 445).

A summary of some of the most relevant testimony is as follows:

Rose Marie Schmidt, a beauty shop customer, testified she saw John Merlo arrive. (Tr. 111). John and Sharon went into the furnace room. (Tr. 113). Rose Marie was sitting on a sofa facing the entrance door to the shop. (Tr. 128). She did not hear anything from the back room. If there was any talking above normal conversation she would not have heard it. (Tr. 137-138). Contrary to Petitioner's statement of facts, she could have been 15 to 18 feet from where John and Sharon were standing. (Tr. 136). Although she testified that John's stride as he followed Sharon out of the back room was normal (Tr. 115), this is in conflict with another customer's testimony, Lois Witaker, that John walked out in a "fast" manner (Preliminary examination-47). There was only a short distance between the doors of the back room to where John followed Sharon out, approximately three feet, so John could not actually have distance to run. Lois Witaker's testimony at preliminary examination, p. 47.

Diane Brennan, another beauty shop customer, saw Sharon come out of the back room, light a cigarette, and go back in. (Tr. 161). She described the appearance of the face of Sharon when she came out of the back room just prior to the shooting as flushed, like there was still something unsaid between John and Sharon. (Tr.184).

Andrea Pojarski was a hairstylist in the beauty shop. (Tr. 188). Andrea heard shots and ran into the back room. (Tr. 192). Contrary to Petitioner's statement of facts that Andrea did not see John come out right after Sharon, she merely testified that she did not see John come out at all. (Tr. 192).

Martha Stanfield, owner of the beauty shop, was present but did not see the shooting. (Tr. 224). She heard Sharon use the word "car" when speaking to John in the back room. (Tr. 223). Although she testified that she did not see any spit on John Merlo's face nor any slap marks, Petitioner fails to mention that she testified if there were any marks on his face she probably would not have observed them anyway. (Tr. 239). Sharon called Martha at work and warned her to keep the door locked because John had threatened to go to the shop and "blow his brains out". (Tr. 363, 367-368). Martha had knowledge that the police detectives were supposedly watching the beauty shop a couple of weeks prior to the incident because John threatened to blow his brains out. (Tr. 365-367).

Lois Witaker, a customer, testified that there was not much time from when Sharon exited the back room and when she was shot. It was 10 seconds. (Tr. 245, 268). She testified that John followed Sharon out of the back room right behind her within a couple of feet. (Tr. 262). Sharon was shot right after she barely turned around in back of a beauty shop chair. (Tr. 258).

Diane Wilshire, Sharon's sister, saw John while she was in the hospital having her first baby. (Tr. 412). Diane testified that the victim's mother had been told that John might go to the beauty shop and kill himself. (Tr. 416).

Robert Payton, Sharon's boyfriend, began dating Sharon in late October, 1966. (Tr. 399). He talked to Sharon at a restaurant four weeks after the baby was born. (Tr. 399). A week later Sharon started her action for divorce. (Tr. 408). Sharon's parents knew she was dating Payton. (Tr. 401). Sharon and Payton were thinking of marriage. (Tr. 402). Sharon herself told Payton

that John might go to the beauty shop and kill himself three weeks prior to the shooting. (Tr. 404).

John Merlo testified that he and Sharon lived in an apartment in Wayne, Michigan after the marriage. They were happily married. (Tr. 422-423). They moved to Sharon's parents house later. (Tr. 422). John was thrown out of their house three times. (Tr. 425, 428, 430, 434-435). Sharon asked John for a divorce but would not give a reason why. (Tr. 432). He testified that when he went to the beauty shop to reconcile the marriage or kill himself, Sharon stated she was upset because John damaged her car. (Tr. 463). She said she would never take him back, spit in his face, shoved him into the wall of the back room of the beauty shop and told John to "get the hell out of here punk. Get out of my life." (Tr. 464). The victim's mother, Lillian Kamen, who was not indorsed as a witness, was present during Respondent's testimony. (Tr. 417-429).

During opening statement of Defense, after the People had rested, the courtroom was cleared of Lillian Kamen, who had caused some courtroom disruption, and other family members. (Tr. 385). After a five minute recess the Court allowed Mrs. Kamen and other family members to stay in the courtroom but were cautioned by the Court. (Tr. 387). Mrs. Kamen was again excused from the courtroom while Respondent was giving his testimony. (Tr. 429).

Lillian Kamen, Sharon's mother, who was an unindorsed and unexpected witness, testified as a rebuttal witness to Merlos' previous testimony. She testified that John wrote a number of letters concerning the care of the baby. (Tr. 559). She testified that John had told her he would go to the beauty shop and kill himself. (Tr. 561). However, she also testified that John had stated, "I warned her ahead of time. I left a bullet in the front seat." (Tr. 553). Merlo's previous testimony, elicited by the prosecutor when he was cross examining Merlo, was a denial of placing a bullet on a front car seat.

On December 20, 1967, Mr. Merlo was convicted of first degree premeditated murder in the Circuit Court for the County of Oakland and sentenced to a non-parolable life imprisonment, although Merlo's defense emphasized lack of premeditation. (Tr. 381).

Mr. Merlo filed a Claim of Appeal in 1970 and the Michigan Court of Appeals confirmed his conviction in People v Merlo, 23, Mich App 694, 703 (1970). In his appeal, his court appointed attorney attempted to have the case reversed on several arguments. One of the arguments were that the use of Lillian Kamen's rebuttal testimony as evidence was an abuse of the trial Court's discretion. He failed to argue that rebuttal testimony directed at a prosecution elicited denial is reversible error.

Mr. Merlo's Delayed Application For Leave To Appeal, filed in 1975, was denied by the Michigan Supreme Court. In neither the 1970 appeal, nor the 1975 appeal was the jury instruction of the Court challenged for shifting the burden of proof. Some of the other issues appealed were admissability of evidence as a result of a questionable confession and the prosecutor's failure to state facts to be relied on in proving premeditation.

In 1977, defendant filed a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan but did not challenge the Court's instructions as impermissably shifting the burden of proof. He was unsuccessful.

On November 4, 1982, defendant Merlo's Delayed Motion For New Trial, in which he raised the same issue of Sandstrom error reviewed in this Court, was denied.

On June 13, 1983, the Court of Appeals denied leave in this case based upon the same Sandstrom issues.

On December 29, 1983, the Michigan Supreme Court denied leave based upon these same issues.

On January 28, 1985 the District Court granted defendant's conditional writ of habeas corpus requiring the State to commence trial within 90 days, or release Mr. Merlo unconditionally. Although Mr. Merlo raised ineffective assistance of counsel as

grounds for habeas corpus, the Court did not reach that issue because it found a Sandstrom error sufficient to grant the writ. Petitioner's appendix D.

On April 5, 1985, Mr. Merlo was appointed counsel by the court of appeals.

On August 26, 1985 oral arguments on the merits of three primary issues were heard before a panel of the court of appeals. The issues were: (1) Was there procedural default by Respondent for failure to object at trial to the improper jury instructions under Wainwright v Sykes, 433 US 72 (1974); (2) Was there a Sandstrom error and (3) Was the Sandstrom error harmless beyond a reasonable doubt? Case number 85-2145.

On or about September, 1985 the court of appeals issued an opinion which remanded the procedural default issue to the district court. The Court held that "the state extensively briefed and defended on the basis of the Wainwright doctrine. Without mentioning or discussing this defense, the District Court issued the writ." Petitioner's appendix C.

On December 27, 1985 the district court held in favor of Respondent that there was in fact no procedural default. Again, the district court ordered a new trial to begin within 90 days and if the state did not do so, Respondent was to be unconditionally released at that time. The new trial deadline was to expire March 27, 1986. Petitioner's appendix B.

On January 23, 1986 a Notice of Appeal to the court of appeals was again filed.

On September 18, 1986 the court of appeals issued a decision affirming the district court. Petitioner's appendix A.

John Merlo has been continuously incarcerated for the past 20 years.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

I

RETROACTIVITY

The retroactivity of Sandstrom v Montana, 442 US 510 (1979), was not raised as an issue in either of two hearings before the district court. It was raised for the first time in the second of two hearings before the court of appeals. This issue was implicitly stricken by the court of appeals, although that court referred to the issue in dictum in a footnote of its opinion when refusing to consider the issue. Retroactivity was not considered by the courts below. Therefore, this Court should not consider the issue.

II

RETROACTIVITY

Petitioner alleges a conflict between the Michigan Supreme Court case of People v Woods, 416 Mich 581; 331 NW 2d 707 (1982), finding limited Sandstrom retroactivity, and the court of appeals, finding full Sandstrom retroactivity. There is uniformity among the federal circuits finding full retroactivity. Woods involved a Sandstrom jury instruction that contained obvious permissive inferences, contrary to the instruction used in Sandstrom and most definitely contrary to the instruction in the case at bar. Woods found that the permissive inference of its jury instruction and the instruction used in Sandstrom distinguished Sandstrom from the cases that it relied on in which this Court found full retroactivity, e.g., Mullaney v Wilbur, 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508 (1975). The instant instruction conveys substantially the same message as in Mullaney. Through analogy to Mullaney, the federal

courts of appeals have held that Sandstrom type instructions substantially impair the truth-finding function and raise serious questions about the accuracy of guilty verdicts in past trials. The Michigan Supreme Court disagreed. Due to this Courts holding in Williams v United States, 401 US 646, 653, 91 S Ct 1148, 28 L Ed 2d 388 (1971), full retroactivity is therefore conclusive and the federal courts will go no further in their retroactivity analysis. Woods does go further and finds that the effect full retroactivity would have on Michigan's system of justice is unacceptable.

This Court in Hankerson v North Carolina, 432 US 233, 97 S Ct 2339, 53 L Ed 2d 306 (1977) held that it is unlikely that defense lawyers made objections to the jury instructions at trial and the States may be able to insulate themselves to past convictions by asserting their own procedural default rule. Petitioner neglected to properly assert procedural default in the instant case. Since the States can effectively limit Sandstrom's retroactive effect through procedural default, the issue of full retroactivity is moot and certainly does not warrant review.

III

HARMLESS ERROR

Petitioner's argument, that the court of appeals did not perform a thorough inquiry, is erroneous. The court exerted substantial effort to consider the record in its entirety. Petitioner's statement of the facts is not an accurate reflection of the transcript. The court applied the proper standard of review in analyzing harmless Sandstrom error, the standard recently enunciated by this Court in Rose v Clark, 476 US ____, 106 S Ct 3103, 92 L Ed 2d 460 (1986). The court considered the record in its entirety,

including all jury instructions. Although this Court has authority to decide whether, on the facts of a particular case, a constitutional error was harmless, this Court will generally not do so.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE RETROACTIVITY OF SANDSTROM V MONTANA, 442 US 510 (1979), IS A NEW ISSUE BEING IMPROPERLY RAISED ON APPEAL

The history on how this retroactivity issue arose in this cause is as follows:

1. On January 28, 1985, district court Judge Stewart A. Newblatt issued a conditional writ of habeas corpus due to a burden shifting Sandstrom jury instruction. Petitioner's appendix D.

2. Petitioner's arguments before the district court were: 1.) There was a Wainwright v Sykes procedural default by Respondent 2.) The jury instruction error was not a Sandstrom error, and 3.) Even if the jury instruction at issue was unconstitutional, it was harmless beyond a reasonable doubt. Retroactivity was not briefed or argued. Appendix A.

3. Petitioner appealed the decision of the district court. Notice of Appeal was filed with the court of appeals on February 8, 1985.

4. On appeal before the court of appeals, case number 85-1145, Petitioner raised the same three primary issues raised in the district court below. Oral arguments were heard on August 26, 1985. Retroactivity was not briefed nor argued. Appendix B.

5. On or about September, 1985 the court of appeals remanded the Wainwright v Sykes procedural default issue to the district court below. Merlo v Bolden, 774 F2d 1163 (CA 6, 1985), unpublished opinion. Petitioner's appendix C.

6. On remand, the only issue brief and argued was Wainwright v Sykes procedural default. However, Petitioner filed no additional brief.

7. On December 27, 1986 the district court held in favor of

Respondent that there was in fact no Wainwright v Sykes procedural default. Petitioner's appendix B.

8. On January 23, 1986 the Petitioner filed another Notice of Appeal with the court of appeals regarding the district court's remand decision on Wainwright v Sykes procedural default. Petitioner also appealed the harmless error issue again, presumably because the court of appeals did not explicitly address that issue in its prior opinion remanding the cause. At this point Petitioner also raised the issue whether Sandstrom should be applied retroactively in Respondent's case for the first time.

9. The retroactivity issue was not presented to the district court in the past, in either appearance before that Court.

10. The court of appeals should not pass upon retroactivity since it was not raised in the district court or the court of appeals in the past and Petitioner was precluded from ever raising the issue again. Bannert v American Can Company, 525 F2d 104, 111 (CA 6, 1975) citing Hormel v Helvering, 312 US 522, 556, 61 S Ct 719, 85 L Ed 1037 (1941) and Schneider v Electric Auto-Lite Company, 456 F2d 366, 375 (CA 6, 1972) Sigman Fuel Company v Valley Authority, 754 F2d 162, 164-165 (CA 6, 1985); See also Williams v United Distributive Workers Council 30 AFL-CIO (Silvercup Bakeries), 529 F2d 509 CA 6, 1976); Lyons v United States, 123 F2d 507 (CA 6, 1941); United States v Oritz, 422 US 891, 898, 95 S Ct 2585, 45 L Ed 2d 623 (1975). Specifically as it applies to habeas corpus proceedings, see Brown v Marshall, 704 F2d 333 (CA 6, 1983).

11. On May 5, 1986 Respondent filed a motion to strike the retroactivity issue with the court of appeals. Appendix C. Petitioner presumably had no defense to the motion and did not file a response.

12. The court of appeals did not issue an order answering Respondent's motion to strike the retroactivity issue. This writers telephone inquiry with a case supervisor of the court of appeals on June 27, 1986 indicated that a decision had not been made by the panel assigned to the case whether the motion was granted or denied.

13. On August 5, 1986 this writer argued the case on behalf of Respondent before the court of appeals. For purposes of budgeting his time , at the hearing this writer asked the panel of the court of appeals whether he should allocate any of his time to arguing retroactivity because he had not received a response to the motion to strike. This writer was advised by the panel to proceed under the assumption the new issue had been stricken.

14. On September 18, 1986 the court of appeals decided the case and issued its published opinion, Merlo v Bolden, 810 F 2d 252 (CA 6, 1986); Petitioner's appendix A. The body and holding of the opinion did not address retroactivity. Retroactivity was merely mentioned as dictum as a "subsidiary issue" in a footnote to the opinion in which the Court said "In light of our Circuit precedent on the issue, we have no occasion to reconsider the retroactivity of Sandstrom." 801 F2d at 255, n.1; Petitioner's appendix pages A-8 and A-9.

In light of the facts above, it is reasonable to conclude that Respondent's motion to strike retroactivity was implicitly granted by the court of appeals. Petitioner had two prior appearances in the district court and one prior appearance in the court of appeals to brief and argue retroactivity. It was not until Petitioner's second hearing in the court of appeals that Petitioner attempted to brief and argue the newly injected issue. The court of appeals explicitly stated in its footnote 1, 801 F2d at 255, n.1, Petitioner's appendix pages A-8 and A-9, that it was not considering retroactivity. This Court has previously held as follows:

> This court is a court of review, and it will not consider questions not raised or disclosed by the record brought to it for review, and which were not considered by the courts below. McClellan v. Carland, 217 U.S. 268, 283, 54 L.Ed. 762, 767, 30 Sup. Ct. Rep. 501; Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271, 285, ante, 282, 288, 45 Sup. Ct. Rep. 82. And see Davis v. Currie, 266 U.S. 182, ante, 234, 45 Sup. Ct. Rep. 88, and United States Fidelity & G. Co. v. Wooldridge, decided

May 11, 1925 [268 U.S. 234, ante, 932, 40 A.L.R. ____, 45 Sup. Ct. Rep. 489.]

Edward Hines Yellow Pines Trustees v Martin, 268 US 458, 45 S Ct 543, 69 L Ed 1050, 1054.

This Court has jurisdiction to consider an issue not raised below, but this Court is generally reluctant to do so. Berkemer v McCarty, 468 US 420, 104 S Ct 3138, 82 L Ed 2d 317 (1984). This Court has held that where an issue is not properly raised, litigated or passed upon below, the writ will be dismissed. McCullough v Kammerrer Corp., 323 US 327, 65 S Ct 297, 89 L Ed 273 (1945); also, Calmar Steamship Corporation v United States of America, 345 US 466, 73 S Ct 733, 97 L Ed 1140, 1147 (1953); Vaughn v Atkinson, 369 US 527, 82 S Ct 997, 8 L Ed 2d 88, 92 (note 2)(1962).

II

THE CONFLICT BETWEEN THE HOLDINGS OF THE FEDERAL COURTS OF APPEALS, FINDING SANDSTROM TO BE FULLY RETROACTIVE, AND THE MICHIGAN SUPREME COURT, FINDING SANDSTROM TO BE OF LIMITED RETROACTIVITY, LACKS MERIT FOR REVIEW AND MAY NEVERTHELESS BE CONSIDERED A MOOT ISSUE.

Petitioner relies on the Michigan Supreme Court case of People v Woods, 416 Mich 581; 331 NW2d 707 (1982), which held that Sandstrom v Montana, 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979), is to be given limited retroactive effect, i.e., only applied to cases raising the Sandstrom error and pending on direct appeal at the time Sandstrom was decided, to support a conflict between a state court of last resort and a federal court of appeals for purposes of review on certiorari. Petitioner alleges no conflict among the federal courts of appeals. In fact, Petitioner's latest brief before the court of appeals

admits the uniformity among the circuits where Petitioner stated:

> Other circuits which have addressed this issue have also applied Sandstrom retroactively. Ramirez v Jones, 683 F2d 712, 717 (CA 2, 1981); Guthrie v Warden, Maryland Penitentiary, 683 F2d 820, 823, n.3 (CA 4, 1982); Dietz v Solem, 640 F2d 126, 130 (CA 8, 1981).
>
> (Appendix D, page 12)

Woods found that the following jury instruction is substantially similar to the one disapproved in Sandstrom v Montana:

> you may presume, with regard to wilful and intentional actions, the [sic] people normally are presumed to intend the consequences of their own act. People normally may not be heard to say that they did not intend the natural consequences of their acts in the absences [sic] of circumstances that demonstrate something to the contrary. (Emphasis supplied.)

The instruction in Sandstrom was that "the law presumes that a person intends the ordinary consequences of his voluntary acts," Sandstrom, 442 US at 513, Woods, 416 Mich at 612. Woods held that the jury instruction in the case before it and the instruction in Sandstrom could reasonably have been determined to be a permissive inference rather than conclusive or rebuttable presumptions. Woods acknowledged that the cases that Sandstrom relied on are fully applied retroactively.[1] However, Woods held that the possibility of a permissive inference distinguished Sandstrom from the cases that it relied on and that for this reason Sandstrom should not be given full retroactive effect.

Respondent contends that any permissive inference that could be obtained from the jury instruction in the instant case is negligible or non-existent, contrary to the instruction quoted above from Woods. See for example page 17 of Petitioner's petition where he underlines portions of the instruction. The "unless"

[1] In Sandstrom, the Court relied on four major cases, i.e., Mullany v Wilbur 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508 (1975); In re Winship, 397 US 358, 364, 90 S Ct 1068, 25 L Ed 2d 368 (1970); United States v United States Gypsum Co., 438 US 422, 98 S Ct 2864, 57 L Ed 2d 854 (1978); MORISSETTE V UNITED STATES, 342 US 246, 72 S Ct 240, 96 L Ed 288 (1952). Note that Morissette is a 1952 case, decided well before Respondent's case.

language emphasized there instructs the jury that the only way the presumption does not apply is if the evidence indicates the contrary. There is nothing permissive about it if the evidence does not prove that Respondent did not intend, contemplate and design the killing. And of course, who is to bring forth the evidence but the Respondent himself. The distinction that Woods finds for differentiating between Sandstrom and the cases that Sandstrom relies on which are applied retroactively (e.g., Mullany, supra), is tenuous at best and when applied to the instant case, should be totally inapplicable.

In Mullaney the jury was instructed that "if the prosecution established that the homocide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." A Mullaney error is given full retroactive effect by this Court. Hankerson, infra. Sandstrom relied heavily on Mullaney. Furthermore, Mullaney addressed the reasonable doubt standard imposed by the Fourteenth Amendment, the same as Sandstrom. And, practically speaking, the jury instruction in the instant case conveys the same message to the jury as in Mullaney. In Dietz v Solem, 640 F2d 126, 130 (CA 8, 1981) the Court of Appeals for the Eighth Circuit stated:

> While it is true that not all decisions have retroactive force, the Supreme Court in Hankerson v North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L Ed 2d 306 (1977) held that the decision in Mullaney v Wilbur, 421 US 684 95 S Ct 1881, 44 L Ed 2d 508 (1975), was to be given retroactive application. In light of the fact that the Sandstrom decision heavily relied on Mullaney and addressed a due process claim almost identical to Mullaney, we hold that Sandstrom must be applied retroactively. As was stated in Hankerson:
>
> "'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilt verdicts in past trials, the new rule [is] given complete retroactive effect.'"
>
> Hankerson v North Carolina, supra, 432 U.S. at

243, 97 S Ct at 2345, citing Ivan V v City of New York, 407 U.S. 203, 204 (1972)

The Woods decision acknowledged that the first of the three criteria of the Linkletter-Stovall approach in analyzing retroactivity is the most important. Woods, supra, 416 Mich at 618, citing Desist v United States, 394 US 244, 89 S Ct 1030, 22 L Ed 2d 248 (1969), also quoting Williams v United States, 401 US 646, 91 S Ct 1148, 28 L Ed 2d 388 (1971). Specifically, this criterion is "the purpose to be served by the new standards." It is at this important point of analysis that the Michigan Supreme Court and the court of appeals position are in total disagreement. The court of appeals stated in Burton v Bergman, 649 F2d 428, 431, n.3 (CA 6, 1981), vacated and remanded on other grounds, 456 US 953, 102 S Ct 2026, 72 L Ed 2d 478 (1982) as follows:

> We hold that the rule in Sandstrom must be applied retroactively. We are not certain that Sandstrom announces a new constitutional principle; it seems to be simply an application of the principle established by Winship. See Lee v Missouri, 439 U.S. 461, 462, 99 S Ct 710, 711, 58 L Ed 2d 736 (1979). However, even if Sandstrom articulates a new rule, the major purpose of the rule is to overcome an aspect of the trial that substantially impairs its truth finding function and raises serious questions about the accuracy of guilty verdicts in past trials. For that reason the rule must be applied retroactively. Hankerson v North Carolina, 432 U.S. 233, 97 S Ct 2339, 53 L Ed 2d 306 (1977).....

"Retroactive application of Sandstrom has been recognized in this Circuit since the instructional error would normally affect a defendant's right to a fair trial and impact upon the ultimate issue of innocence or guilt." Conway v Anderson, 698 F2d 282, 284 (CA 6, 1983), citing Williams v Engle, 683 F2d 152 (CA 6, 1982); Krzeminski v Perini, 614 F2d 121 (CA 6), cert denied, 449 U.S. 866, 101 S Ct 199, 66 L Ed 2d 84 (1980); Burton v Bergman, 649 F2d 428 (CA 6, 1981), vacated and remanded on other grounds, 456 U.S. 953, 102 S Ct 2026, 72 L Ed 2d 478 (1982).

Woods is in disagreement in that it holds that the truth-finding function is not substantially impaired to create a clear danger of convicting the innocent. 416 Mich at 620.

This Court in Williams v United States, 401 US 646, 653, 91

S Ct 1148, 28 L Ed 2d 388 (1971), held as follows:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Since the major purpose of Sandstrom is to overcome an aspect of the trial that substantially impairs its truth finding function and raises serious questions about the accuracy of guilty verdicts in past trials, Williams, supra, precludes further analysis to consider the other two criteria, i.e., reliance on old standards and the effect on the administration of justice. But Woods did go further and found that the effect full retroactivity would have on Michigan's system of justice is unacceptable. 416 Mich at 621. Therefore, Woods concluded that Sandstrom only be given limited retroactive effect. However, because serious questions are raised about the accuracy of guilty verdicts in past trials when there is a Sandstrom error, this Court should not continue to analyze the effect on Michigan's administration of justice. Nevertheless, as will be seen, a burden could be avoided in these cases.

"Nor have such burden-shifting instructions been countenanced antecedent to Sandstrom." Conway, supra, citing United States v Reeves, 594 F2d 536 (CA 6), cert denied, 442 US 946, 99 S Ct 2893, 61 L Ed 2d 317 (1979). And as Woods itself acknowledged, one of the four major cases that Sandstrom relied on was the 1952 case of Morissette v United States, 342 US 246, 72 S Ct 240, 96 L Ed 288 (1952). Woods, 416 Mich at 617. The fact that the trial occurred 20 years ago does not mean that the Sandstrom principal should not be applied to the instant case.

Respondent makes an issue of the assertion that "retroactive application of Sandstrom puts a heavy burden upon the People of the State of Michigan to retry a murder case after a lapse of

nearly twenty years." Petitioner's petition, page 11. In fact, the Michigan Supreme Court seemed to place much weight on this issue in arriving at its decision in Woods. However, in Hankerson, supra, which ruled on Mullaney, supra, one of the four major cases that Sandstrom relied on, this Court stated at 432 US 244, n.8:

> Moreover, we are not pursuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed. Rule Crim. Proc. 30.

Also, in this respect the instant case is the same as Mullaney. Here the Court below found that the Petitioner waived the right to assert Respondent's failure to object to the jury instruction because Petitioner did not expressly raise the procedural default issue in his responsive brief before the Michigan Court of Appeals or the Michigan Supreme Court and, therefore, the state courts implicitly passed on the merits of Respondents claims. 801 F2d at 255; Petitioner's appendix pages A-7 and A-8. Petitioner does not dispute this portion of the lower Court's holding. The Michigan Courts can begin to impose their own procedural default rules for Sandstrom errors and the Respondent can be more careful in raising such defaults upon appeal to avoid a "heavy burden" that Respondent complains of. In fact, all states can effectively limit Sandstrom's retroactive effect by merely enforcing their own procedural default rules. Therefore, Sandstrom's retroactivity is essentially a moot issue not warranting a review on writ of certiorari pursuant to Rule 17.

III

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW IN DETERMINING WHETHER SANDSTROM WAS HARMLESS. WHETHER A SANDSTROM JURY INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT IS A FACTUAL DETERMINATION THAT THIS COURT ORDINARILY DOES NOT ENTERTAIN

Petitioner's allegation, petition page 16, that "It does not appear from the Sixth Circuit's opinion that the court 'undertook a thorough inquiry' into the evidence," is an absurd statement. The court of appeals read and summarized approximately 700 pages of transcript in its opinion and disclosed facts that this writer did not even discover after reading and summarizing the transcript at least four times. In fact, the court of appeals devoted more than one-half of its opinion to a development of the facts as disclosed by the whole record. Respondent's counterstatement of facts, which more accurately explains the record, contained herein and the opinion of the court of appeals, speak for itself. In addition, nowhere does Petitioner mention suicide, the main defense of Respondent. The court applied the proper standard for review, that enunciated by this Court in the recent case of Rose v Clark, 476 US ____, 106 S Ct 3103, 92 L Ed 2d 460 (1986). The court of appeals quoted from this Court's opinion in Chapman v California, 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967) "that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt" (Emphasis added). 801 F2d at 256, Petitioner's appendix page A-9.

Page 17 of Petitioner's petition emphasizes protions of the jury instruction and states that they condition the finding of guilt upon a review of the evidence. But as mentioned at pages 15 & 16 of this brief, a reasonable juror could have interpreted this to

mean that Respondent is guilty unless his evidence proves the contrary.

Page 18 of Petitioner's brief states that "The Sixth Circuit never considered the full instruction to the jury in the instant case." All portions of the jury instruction cited, discussed and/or quoted at pages 18 and 19 of Petitioner's petition were previously brought to the attention of the court of appeals through Petitioner's brief before that Court. Appendix D, pages 8-10. There is absolutely no reasonable basis for Petitioner's allegation. Furthermore, Petitioner's allegation that the Sandstrom error was mitigated by other statements before the jury can be further rebutted when the district court found as a factual matter, through its review of the transcript, that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Petitioner's Appendix page D-5. In addition, the court of appeals explicitly stated "we will apply the traditional Chapman harmless error analysis to determine whether the record, examined in its entirety, establishes guilt beyond a reasonable doubt." (Emphasis supplied). 801 F2d at 257, Petitioner's appendix pages A-11 - A-12.

As this Court stated in Rose, supra, 106 S Ct at 3109:

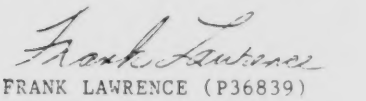
> Although we "plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error was harmless under the Chapman standard, we "do so sparingly".

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: January 12, 1987

Respectfully submitted,



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MERLO,

Petitioner,

v

Civil No. 84-CV-8023-FL
HON. STEWART A. NEWBLATT

DAN BOLDEN,

Respondent.
_____/

ANSWER TO PETITION
FOR WRIT OF HABEAS CORPUS

NOW COMES Respondent, by and through his attorneys, Frank J. Kelley, Attorney General for the State of Michigan, and Edgar L. Church, Jr., Assistant Attorney General, and in response to Petitioner's Application for Federal Writ of Habeas Corpus, says as follows:

PETITION ALLEGATIONS

1. In response to Petitioner's ground one, Respondent denies the allegations contained therein for the reasons that:

a. Petitioner's claim that "Petitioner was deprived of his right to due process and a fair trial under the 14th Amendment to the United States Constitution and under Section 17, Article 1, Michigan Constitution, 1963, when the trial judge instructed the jury that the law presumes that a

RBC

person intends the ordinary consequences of his voluntary acts" is without merit. Respondent hereby relies on the argument set forth in the Oakland County Prosecuting Attorney's Brief on Appeal in the Michigan Supreme Court, Docket No. CR 67-2604-FY (page 1).

b. A number of lower courts have recognized that not all Sandstrom type of instructions embody the same potential for harm. They have carefully examined the precise language for "rhetorically inconsistent", Sandstrom, 442 US 510, n. 7 (1979), qualifications or explanations. Some have found that particular words eliminate the constitutional violation as a threshold matter. See Pigee v Israel, 670 F 2d 690, 693-695 (CA 7, 1982); Jacks v Duckworth, 651 F 2d 480, 485-486 (CA 7, 1981), cert den 102 S Ct 110 (1982). Others telescope their linguistic analysis into a harmless inquiry. Rock v Coombe, 694 F 2d 908 (CA 2, 1982), cert den 102 S Ct 1773 (1983); Mancusco v Harris, 677 F 2d 206 (CA 2, 1982).

2. In response to Petitioner's ground two, Respondent denies the allegations contained therein for the reasons that:

a. Petitioner's claim that "Petitioner was deprived of a fair trial and due process under the 14th Amendment to the United States Constitution and Section 17, Article 1, Michigan Constitution, 1963, when the trial judge, in his charge to the jury, improperly conveyed the impression that the jury must acquit on the principal charge before considering lesser charges" is without merit. Respondent

hereby relies on the argument set forth in the Oakland County Prosecuting Attorney's Brief on Appeal in the Michigan Supreme Court, Docket No. CR 67-2604-FY (page 2).

b. Further, errors and instructions to the jury do not ordinarily involve the deprivation of federal constitutional rights. Gimmel v Bucko, 358 F 2d 338 (6th Cir.), cert den 385 US 962 (1966). Petitioner has thus failed to state a cognizable claim under 28 USC 2254.

3. In response to Petitioner's ground three, Respondent denies the allegations contained therein for the reasons that:

a. Petitioner's claim that "Petitioner was deprived of his right to due process and equal protection under the 14th Amendment to the United States Constitution and Section 17, Article 1, Michigan Constitution, 1963, when the trial judge instructed the jury that intent may be inferred by the use of a deadly weapon" is without merit. Respondent hereby relies on the argument set forth in the Oakland County Prosecuting Attorney's Brief in the Michigan Supreme Court, Docket No. CR 67-2604-FY (page 3).

4. In response to Petitioner's ground four, Respondent denies the allegations contained therein for the reasons that:

a. Petitioner's claim that "Petitioner was deprived of his right to due process and equal protection under the 14th

Amendment to the United States Constitution and under Section 17, Article 1, Michigan Constitution, 1963, when the trial judge instructed the jury that malice may be implied from the doing of any deliberate or cruel act against another" is without merit. Respondent hereby relies on the argument set forth in the Oakland County Prosecuting Attorney's Brief on Appeal in the Michigan Supreme Court, Docket No. CR 67-2604-FY (pages 4-5).

5. In response to Petitioner's ground five, Respondent denies the allegations contained therein for the reasons that:

a. Petitioner's claim that "Petitioner was deprived of a fair trial and to due process under the 14th Amendment to the United States Constitution and under Section 17, Article 1, Michigan Constitution, 1963, when the trial judge's instructions to the jury shifted the burden of proof from the state to Petitioner" is without merit. Respondent hereby relies on the argument set forth in the Oakland County Prosecuting Attorney's Brief on Appeal in the Michigan Supreme Court, Docket No. CR 67-2604-FY (page 1).

6. In response to Petitioner's ground six, Respondent denies the allegations contained therein for the reasons that:

a. Petitioner's claim that "Petitioner was denied effective assistance of counsel in violation of his 6th Amendment right to same during his trial" is without merit. Respondent hereby

relies on the argument set forth in the Oakland County Prosecuting Attorney's Brief on Appeal in the Michigan Supreme Court, Docket No. CR 67-2604-FY (pages 6-7).

7. The instant Petition is subject to dismissal under Rule 9(b). Petitioner did not raise the issues referred to above in his Writ filed in 1977 under USDC No. G76-85-CA1.

RECORD

8. The following documents are filed with this Answer:

a. Petitioner's Preliminary Examination Transcript dated February 24, 1967;

b. Petitioner's Trial Transcript (Volumes I and II) dated December 12, 13, 14, 15, 19 and 20, 1967;

c. Portions of Michigan Court of Appeals File No. 68975 and 5278;

d. Entire Michigan Supreme Court File No. 72007 and 57333.

RELIEF

WHEREFORE, Respondent requests that Petitioner's Application for Federal Writ of Habeas Corpus be denied.

Respectfully submitted,

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Dated: April 24, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MERLO,

Petitioner,

v

Civil No. 84-CV-8023-FL
HON. STEWART A. NEWBLATT

DAN BOLDEN,

Respondent.
_____/

BRIEF IN SUPPORT OF ANSWER TO
PETITION FOR WRIT OF HABEAS CORPUS

COUNTERSTATEMENT OF FACTS

On January 6, 1967, Petitioner's estranged wife was shot four times and killed at the Crest Beauty Salon in Farmington Township, Michigan. This occurred after Petitioner entered the salon, spoke with the victim in a back room, and had followed the victim back to the work area of the salon.

Part of the evidence against Petitioner was his own confession, given to authorities in Philadelphia who had arrested him on forged check and weapon possession charges. (T, 314-317)

There were several eyewitnesses to the murder -- the customers and others who worked at the salon. Although Petitioner claimed his wife had provoked the shooting, none of the eyewitnesses in the main room at the Crest Beauty Salon heard sounds from the furnace room where Petitioner and his wife had gone to talk. (T,

115, 164, 203-204, 206, 208, 210, 215, 223, 248) No noisy equipment was then in operation in the salon. (T, 120) The doors to the furnace room were open. (T, 114, 204-205, 209) Some of the witnesses were wary of possible trouble and/or were observant of the furnace room. (T, 177-178, 181, 256) None of the eyewitnesses observed spittle or possible slap marks on Petitioner's face. (T, 238-239, 266) Petitioner's gait as he walked from the furnace room toward his wife was described as "normal." (T, 115) There was clear testimony that Petitioner fired two of four shots at the victim while she was lying on the floor (T, 115-117) or as she was slumping to the floor. (T, 245-246)

Petitioner's own testimony reveals that he and his wife had experienced severe marital difficulties. His wife had rejected his efforts toward reconciliation on numerous occasions. (T, 426-453, 509-510, 531) Testimony in this case also shows Petitioner's familiarity with a gun and his apparent readiness to use it. (T, 415, 446-448, 452, 455-456, 495, 514, 515) The evidence also showed that Petitioner had previously dealt in a physically aggressive manner with the deceased (T, 414, 444-445, 509-510, 531), and had otherwise demonstrated ill will toward her. (T, 451, 511-514) Further, in his own testimony, Petitioner revealed that he killed his wife because of "everything that happened" and that the boyfriend was part of it. (T, 538)

Petitioner filed a Claim of Appeal and the Michigan Court of Appeals confirmed his conviction in People v Merlo, 23

Mich App 694, 703 (1970), in an opinion which stated that Petitioner's guilt of first degree murder was "overwhelmingly established."

Petitioner's Delayed Application For Leave To Appeal filed in 1975 was denied by the Michigan Supreme Court. In neither the 1970 appeal nor the 1975 appeal was the instruction of the Court challenged for shifting the burden.

In 1977, Petitioner filed a Writ of Habeas Corpus in this Court but failed to challenge the Court's instructions as impermissibly shifting the burden of proof.

On November 4, 1982, Petitioner's Delayed Motion for New Trial, in which he raised the same six issues he now seeks to have reviewed in this Court, was denied.

On June 13, 1983, the Court of Appeals denied leave in this case based upon the same six issues now raised before this Court. On December 29, 1983, the Michigan Supreme Court denied leave based upon these same six issues.

ARGUMENT

I

ABSENT A DEMONSTRATION THAT MICHIGAN APPELLATE COURTS DECLINED DISCRETIONARY REVIEW OF PETITIONER'S CONSTITUTIONAL CLAIM BASED ON THE MERITS, A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW.

Petitioner did not object at trial to the court's jury instruction on intent. Such inaction bars Michigan appellate consideration absent a demonstration of "manifest injustice". GCR 1963, 516.2; People v Alcada, 396 Mich 99, 100; 237 NW2d 475 (1976); People v Hawley, 112 Mich App 784; 317 NW2d 564 (1982).

On direct appeal, Petitioner did not claim that any portion of the charge impermissibly shifted the prosecution's burden of proof. People v Merlo, 23 Mich App 694 (1970). In Michigan the failure to raise, argue or brief an issue on initial appeal precludes subsequent review. People v George, 375 Mich 262; 134 NW2d 222 (1965); People v Tubbs, 64 Mich App 341, 347; 236 NW2d 77 (1975).

Respondent finally raised his Sandstrom claim on delayed appeal. The Michigan appellate courts responded with cryptic refusals to exercise discretionary review. GCR 1963, 803.3; 853.1.

In these circumstances, the principles set forth in Wainwright v Sykes, supra, bars federal habeas corpus consideration of Petitioner's

constitutional claim absent a demonstration of "cause" for the procedural default and actual prejudice as a result of the error.

In People v Wright, 408 Mich 1; 289 NW2d 1 (1980), the Michigan Supreme Court ignored the absence of contemporaneous objection in order to reach the merits of a Sandstrom-type error. The court recognized this action as a departure from the general rule but justified it on the grounds that reliance on defense objection and case-by-case assessment of harm "...may inadequately deter continued use of the instructions". Id., 408 Mich 30, n. 13 (emphasis added). Properly read, Wright represents a 1980 policy decision to create a narrow exception to the state contemporaneous objection rule for certain types of instructional errors. It does not conclusively indicate that a 1975 Michigan appellate court, on discretionary appeal, would have ignored GCR 1963, 516.2, to address a pre-Sandstrom claim that presumed intent language in a jury instruction was violative of due process.

Subsequent to its decision in Wright, the Michigan Supreme Court held that Sandstrom applied retroactively to those cases where such instructional claims were pending on direct appeal as of Sandstrom's decisional date. People v Woods, supra, 416 Mich at 621. Woods is consistent with Wright to the extent that the absence of a contemporaneous objection at trial in such cases would not preclude review. But neither decision suggests that cases tried prior to Sandstrom were immune to then applicable caselaw and procedural rules with regard to such errors.

In light of Woods, therefore, the issue is whether there was a controlling state procedural rule at the time of Petitioner's default. Washington v Harris, 650 F2d 447, 451 (CA 2, 1981). It does appear that Michigan appellate courts generally applied GCR 1963, 516.2, to claims of impermissible burden shifting instructions prior to Wright. People v Spalding, 42 Mich App 492, 495-496; 202 NW2d 450 (1972) [alibi instructions]; People v Williams #2, 45 Mich App 630, 640-641; 207 NW2d 180 (1973) [use of deadly weapon implies malice]; Hawley, supra, 112 Mich App at 787-788.

Respondent submits that Wright represents a decision to relax Michigan's procedural requirements in order to establish a principle of law for subsequent cases. Similarly, Woods stands as a choice to waive contemporaneous objection rules for a specific category of cases. But the policy factors that prompted these decisions do not compel their extension of a matter of constitutional law. In Hankerson v North Carolina, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977), this court addressed the argument that retroactive application of Mullaney v Wilber, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), would impose an undue burden on the administration of state judicial systems. Justice White rejected this argument as follows:

> "The states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."
> 432 US at 244, n. 8.

This position has been recently reaffirmed in Engle v Isaac, 456 US 107, 134, n. 43; 102 S Ct 1558; 71 L Ed 2d 783 (1982).

Only if the state courts in this case ignored the procedural default and reached the merits of Respondent's constitutional claim is federal habeas review appropriate. County Court of Ulster County v Allen, 442 US 140, 152-154; 99 S Ct 2213; 60 L Ed 2d 777 (1979); Castaneda v Partida, 430 US 482, 485, n. 4; 97 S Ct 1272; 51 L Ed 2d 498 (1977). Where, as here, the reasons for the state court decision are not explicit, a determination of reliance on procedural default requires consideration of all relevant criteria. These considerations include examination of similar cases, review of the history of the case at bar, and analysis of the language employed by the state court opinions. Ulster County Court, supra, 442 US 140 at 147-154.

Here the Michigan Court of Appeals declined review due to lack of "merit" in the grounds presented and the Michigan Supreme Court thereafter refused relief "because the Court is not persuaded that the questions presented should be reviewed by this Court". Both orders appear to be standard forms for denial of delayed appeals and do not reveal the basis for decision. See Raper v Mintzes, 706 F2d 161, 164 (CA 6, 1983). In context, therefore, the use of the word "merit" in the Court of Appeals order is indicative of only summary consideration of the merits necessitated by the "manifest injustice" exception to the contemporaneous objection rule embodied in GCR 1963, 516.2. See Williams v Abshire, 544 F Supp 315, 319

(ED Mich, 1982); see also Ziegler v Callahan, 659 F2d 254, 271, n. 11 (CA 1, 1981); Murray v Superintendent, 651 F2d 451, 455, n. 6 (CA 6, 1981). This Court, however, has recognized that the existence of state plain error rules will not preclude the applicability of Wainwright, supra. Engle, supra, 456 US 125, n. 27; United States v Frady, 456 US 152, 177-178; 102 S Ct 1584; 71 L Ed 2d 816 (1982) (Blackmun, J., concurring).

An ambiguous silence alone does not imply that the state tribunals reached the merits of Respondent's claim. The Florida courts were silent on the merits of the petitioner's confession claim in Wainwright, supra, 433 US 72, 85-86. Similarly, in Perini v Bell, a companion case to Engle, supra, this Court enforced Ohio's procedural bar where petitioner had failed to raise his constitutional claim of instructional error at trial or on direct appeal. Engle v Isaac, 456 US at 124.

To hold otherwise would indulge a presumption that the state courts have waived procedural requirement in every instant of denial of discretionary review absent express and specific reliance thereon as to the particular claims. Interpretation of inevitable ambiguity in this fashion undercuts the state's ability to enforce its procedural rules. For example, a state defendant who has failed to raise a trial objection withholds his or her claim on direct appeal and thus effectively deprives the state court of the option of either rejecting the claim on procedural grounds or addressing the merits.

The state defendant next exhausts the claim when the courts subsequently refuse to exercise discretionary review. In the federal habeas forum, the petitioner then asserts that procedural default was not the reason for denial of review. For the reasons of comity, finality and societal cost set forth in Wainwright and Engle, this Court must not countenance such a result.

Given state enforcement of a valid procedural rule in this case, the next step in the Wainwright inquiry is whether Respondent can demonstrate "cause" for the default.

Though it appears unlikely that his objection would have been successful in a 1967 Michigan trial court, see Woods, supra, futility alone is no excuse. Engle v Isaac, supra, 456 US at 130. Nor can Respondent claim lack of awareness. It is evident that the constitutional foundation for his argument--that due process requires the state to provide all elements of a crime beyond a reasonable doubt--had been recognized prior to his trial. In re Winship, supra; see also Morissette v United States, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952). Moreover, federal decisions had found impermissible burden shifting effects in similar instructions. Mann v United States, 319 F2d 404, 409 (CA 5, 1963); Stump v Bennett, 398 F2d 111 (CA 8), cert den, 393 US 1001 (1968). Petitioner thus had the "tools to construct [his] constitutional claim" at the time of his trial. Engle, at 133. Wainwright forecloses habeas corpus review in these circumstances.

ARGUMENT

II

EVEN IF VIOLATIVE OF SANDSTROM V MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Introduction

In Connecticut v Johnson, ____ US ____; 103 S Ct 969; 74 L Ed 2d 823 (1983), eight justices of the U. S. Supreme Court divided as to whether a violation of Sandstrom could be harmless constitutional error. Four justices opined that an affirmative concession of intent by the defendant was necessary to render a Sandstrom error harmless. Id., 74 L Ed 2d at 834. The alternative plurality suggested that conclusive evidence of intent should preclude reversal despite a Sandstrom violation. Id., 74 L Ed 2d at 842. The present case revisits this debate.

It is Respondent's position that a harmless error analysis of Sandstrom violations requires a careful assessment of the particular trial context. This review entails a non-mechanistic consideration of the precise language used by the trial court, the emphasis given to the instruction at issue, the issues actually contested by the defense and the weight of the prosecution's case. Undue emphasis on any single factor distorts the reality of the trial. The focus instead must remain on whether the procedural error "contributed to the conviction". Chapman v California, 386 US 18, 23; 87 S Ct 824;

17 L Ed 2d 705 (1967), quoting Fahy v State of Connecticut, 375 US 85; 84 S Ct 229; 11 L Ed 2d 171 (1963). Assessment of such error mandates a consideration of the entire record. United States v Hastings, ____ US ____; 103 S Ct 1974; 76 L Ed 2d 96, 106-107, n. 7 (1983).

A. Instructional Language

The mere use of the word "presume" in a jury instruction on intent does not necessarily generate a Sandstrom violation. The problem in Sandstrom was that the trial court failed to explain or otherwise qualify the presumption. 61 L Ed 2d 46. Left to speculate, a reasonable juror might have interpreted the instruction as either conclusive on the issue of intent or, minimally, affecting a shift of the burden of persuasion to the defendant.

The Sandstrom varient utilized in Connecticut v Johnson was less ambiguous. The clarification, however, proceeded in the wrong direction. The language used by the court explicitly told the jury that the presumption was conclusive. Connecticut v Johnson, supra, 74 L Ed 2d at 829. Such direction certainly increases the likelihood of prejudicial impact on the fact finding process.

It is essential, therefore, to focus on the exact language involved in a particular case. County Court of Ulster County v Allen, supra, 442 US at 157-158, n. 16.

A number of lower courts have recognized that not all Sandstrom type instructions embody the same potential for harm. They have carefully examined the precise language for "rhetorically inconsistent", Sandstom, supra, 442 US at n. 7, qualifications or explanations. Some have found that particular words eliminate the constitutional violation as a threshold matter. Others telescoped their linguistic analysis into a harmless error inquiry.

These courts properly recognize that a contextual interpretation consistent with the principles of Cupp v Naughten, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1972), is essential to evaluations of a claimed Sandstrom violation. Courts on review must assume that jurors will endeavor to effectuate all the trial judges' instructions in a common sense manner. Undue, legalistic emphasis on narrow portions of the charge is artificially contrary to this realistic assumption.

With these matters in mind, a review of the precise language used in this case reveals a far less detrimental charge than the one found erroneous in Sandstrom.

The instruction in the instant case reads as follows:

> "The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce

> death, then it will be presumed that death of the deceased was designed by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used. (T, 601-602)

The instructions have strong conditional clauses at the heart of the instruction.

Absent a mandatory character, the question remains whether the instruction in this case could have been interpreted as burden shifting. This Court, however, has recognized a distinction between presumptions that simply shift the burden of production as opposed to the ultimate burden of persuasion. County Court of Ulster County, supra, 442 US at 157, n. 16. In this case any doubts relevant to the ultimate burden generated by the rule of thumb language should have been resolved by the Court's specific reminder of the reasonable doubt standard.

For these reasons, Petitioner submits that the instruction at issue in this case did not violate Sandstrom. But, even if review reveals the possibility of juror misinterpretation sufficient to invoke Sandstrom, the above analysis illustrates the importance of complete contextual interpretation and is helpful to define the

potential for prejudice. Petitioner submits that such potential is demonstrably less in this case than appears in either Sandstrom or Connecticut v Johnson.

B. Degree of Emphasis

Where constitutional error receives particular prominence at trial, the possibility of harmlessness diminishes. In Bollenbach v United States, 326 US 607; 66 S Ct 402; 90 L Ed 350 (1946), for example, the last thing a potentially deadlocked jury heard was an unconstitutional presumption as an answer to their specific request for guidance on the issue. Similarly, the "machine gun repetition" of Griffin v California, supra, violations was highly significant to the nonharmless error determination in Chapman, supra, 386 US at 27.

In this case, the alleged constitutional violation involves a single terse sentence buried in 12 pages of instructions that took the court approximately fifty-four minutes to read. In these circumstances, there is no basis for a conclusion that a jury would accord special significance to this comment.

C. Materiality of the Intent Issue

A plurality of this Court in Connecticut v Johnson suggested that a Sandstrom error might be harmless where the trial defense effectively concedes the issue of intent. To various degrees,

other courts have also focused the primary emphasis of their harmless error inquiry on whether intent was a disputed or material issue in the case. See Conway v Anderson, 698 F2d 282, 285 (CA 6, 1983) (and cases cited therein); McGuinn v Crist, 657 F2d 1107, 1109 (CA 9, 1981); United States v Winter, 663 F2d 1120, 1144-1145 (CA 1, 1981).

A reasonable harmless error approach is to simply examine the degree to which intent was a significant issue in the case. Where intent, though technically in dispute, was clearly subsidiary to another claim of defense, the likelihood of harm from a Sandstrom instruction decreases dramatically. The contrary requires a speculative assumption that a jury which rejects a hotly contested defense claim will then base conviction on ambiguous instructional language.

The case at bar is illustrative. Here the defense claimed intoxication. Under then applicable Michigan law the defense had to establish that, due to intoxication, defendant either (1) was not capable of knowing he was doing wrong, or (2) lacked the power to resist the impulse to violate the law. People v Finley, 38 Mich 482, 483 (1878). People v Martin, 386 Mich 407, 418; 192 NW2d 215 (1972). Voluntary intoxication was not recognized as a defense in the sense that it could negate general criminal intent. Id., at 484; People v Wright, 58 Mich App 735, 739; 228 NW2d 807 (1975). In this case, the defense sought to demonstrate that Plaintiff killed in the heat of passion, and was unable to control his own emotions and

that because of his drunkenness, was thus unable to form the intent to kill another person. (T, p 585-586, 589)

The Court specifically instructed the jury that:

> "If on the other hand, you find the killing was done during a state of intoxication such that the Respondent was unable to form the intent required to commit the crime and under the instructions I have given you, then your verdict should be that he is not guilty." (T, p 605)

The above was at the end of the Court's instructions to the jury. This instruction clearly addresses the defense's sole challenge to the prosecution's proofs as to general criminal intent. (Petitioner's contention that he was drunk and was thus unable to form the requisite intent.)

In this context, a Sandstrom instruction on intent would have been virtually meaningless to a lay jury.

D. Weight of the Evidence

Closely related to the materiality of the intent issue is the scope and extent of the proofs presented on this issue at trial. Frequently, the reason for nondispute lies in an accurate assessment of the prosecution's case.

Respondent again does not assert that the weight of the evidence is the sole test for harmless instructional error. It is

simply an important step, Holloway v Arkansas, 435 US 475, 488; 98 S Ct 1173; 55 L Ed 2d 426 (1978), in the assessment of "...the probable impact of the [error] on the minds of an average jury." Harrington v California, 395 US 250, 254; 89 S Ct 1726; 23 L Ed 2d 284 (1969). This step is especially crucial where the apparent error rests on the mere possibility of juror misinterpretation.

Any reasonable juror who believed Petitioner had shot the decedent and was not legally incapacitated at the time could not possibly conclude that he lacked the requisite general intent. An ambiguous intent instruction pales to insignificance where the evidence itself is conclusive.

Respectfully submitted,

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Dated: April 24, 1984

No. 85-1145

In The

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN MERLO,

Petitioner-Appellee,

v

DAN BOLDEN,

Respondent-Appellant.

Habeas Corpus

Appeal from the District Court of the United States
for the Eastern District of Michigan
Honorable Stewart A. Newblatt

BRIEF FOR RESPONDENT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FACT SHEET FOR STATE HABEAS CORPUS APPEALS (§2254)

Case Name and Number John Merlo v Dan Bolden, #85-1145

Person Reporting Edgar L. Church, Jr.

1. Has this conviction(s) been previously litigated in the U.S. Courts? ( ) Yes (X) No. If so, give brief history.

2. Constitutional violation claims: name constitutional provision and briefly recite facts asserted as violative.

   a. Appellee claims instructions of trial court are violative of Sandstrom v Montana, 442 US 510 (1979).

   b.

   c.

3. Have remedies been exhausted as to claims listed above?

   a. Yes
   b.
   c.

4. Are there fact disputes concerning claims ( ) Yes (X) No. If so, were they resolved by the District Court?

   a. At hearing?

   b. By review of state court record?

   c. By reference to Magistrate?

   d. Neither, i.e., not resolved

5. Does the State argue that any constitutional violation was found harmless beyond reasonable doubt. If so, briefly state why and cite to appendix pages claimed as proof.

   State claims that instructions, if violative of Sandstrom, were harmless.

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COUNTERSTATEMENT OF ISSUES PRESENTED

I.

WHETHER ABSENT A DEMONSTRATION THAT MICHIGAN APPELLATE COURTS DECLINED DISCRETIONARY REVIEW OF APPELLEE'S CONSTITUTIONAL CLAIM BASED ON THE MERITS, A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW?

II.

WHETHER EVEN IF VIOLATIVE OF SANDSTROM V MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT?

No. 85-1145

In The

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN MERLO,

Petitioner-Appellee,

v

DAN BOLDEN,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT

STATEMENT OF FACTS

On January 6, 1967, Petitioner-Appellee's (hereinafter Appellee) estranged wife was shot four times and killed at the Crest Beauty Salon in Farmington Township, Michigan. This occurred after Appellee entered the salon, spoke with the victim in a back room, and had followed the victim back to the work area of the salon.

Part of the evidence against Appellee was his own confession, given to authorities in Philadelphia who had arrested him on forged check and weapon possession charges (T, 314-317).

There were several eyewitnesses to the murder--the customers and others who worked at the salon. Although Appellee claimed his

wife had provoked the shooting, none of the eyewitnesses in the main room at the Crest Beauty Salon heard sounds from the furnace room where Appellee and his wife had gone to talk (T, 115, 164, 203-204, 206, 208, 210, 215, 223, 248). No noisy equipment was then in operation in the salon (T, 120). The doors to the furnace room were open (T, 114, 204-205, 209). Some of the witnesses were wary of possible trouble and/or were observant of the furnace room (T, 177-178, 181, 256). None of the eyewitnesses observed spittle or possible slap marks on Appellee's face (T, 238-239, 266). Appellee's gait as he walked from the furnace room toward his wife was described as "normal" (T, 115). There was clear testimony that Appellee fired two of four shots at the victim while she was lying on the floor (T, 115-117) or as she was slumping to the floor (T, 245-246).

Appellee's own testimony reveals that he and his wife had experienced severe marital difficulties. His wife had rejected his efforts toward reconciliation on numerous occasions (T, 426-453, 509-510, 531). Testimony in this case also shows Appellee's familiarity with a gun and his apparent readiness to use it (T, 415, 446-448, 452, 455-456, 495, 514, 515). The evidence also showed that Appellee had previously dealt in a physically aggressive manner with the deceased (T, 414, 444-445, 509-510, 531), and had otherwise demonstrated ill will toward her (T, 451, 511-514). Further, in his own testimony, Appellee revealed that he killed his wife because of "everything that happened" and that the boyfriend was part of it (T, 538).

On December 20, 1967, the Appellee was convicted of first degree murder in the Circuit Court for the County of Oakland.

Appellee filed a Claim of Appeal and the Michigan Court of Appeals confirmed his conviction in People v Merlo, 23 Mich App 694, 703 (1970), in an opinion which stated that Appellee's guilt of first degree murder was "overwhelmingly established."

Appellee's Delayed Application For Leave To Appeal filed in 1975 was denied by the Michigan Supreme Court. In neither the 1970 appeal nor the 1975 appeal was the instruction of the Court challenged for shifting the burden.

In 1977, Appellee filed a Writ of Habeas Corpus in this Court but failed to challenge the Court's instructions as impermissibly shifting the burden of proof.

On November 4, 1982, Appellee's Delayed Motion for New Trial, in which he raised the same six issues he now seeks to have reviewed in this Court, was denied.

On June 13, 1983, the Court of Appeals denied leave in this case based upon the same six issues now raised before this Court. On December 29, 1983, the Michigan Supreme Court denied leave based upon these same six issues.

On January 28, 1985, the District Court granted Appellee's conditional writ of habeas corpus allowing the State to commence

trial within 90 days. On February 8, 1985, the State filed a Motion for Stay Pending Appeal, or in the Alternative, Application for Issuance of Continued Custody Pursuant to FRAP 23(c). On March 26, 1985, the District Court extended the time for a new trial an additional 60 days. The District Court had not ruled on Appellant's Motion for Stay as of the filing of this Brief.

ARGUMENT I

ABSENT A DEMONSTRATION THAT MICHIGAN APPELLATE COURTS DECLINED DISCRETIONARY REVIEW OF APPELLEE'S CONSTITUTIONAL CLAIM BASED ON THE MERITS, A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW.

Appellee did not object at trial to the court's jury instruction on intent. Such inaction bars Michigan appellate consideration absent a demonstration of "manifest injustice". GCR 1963, 516.2; People v Alcada, 396 Mich 99, 100; 237 NW2d 475 (1976); People v Hawley, 112 Mich App 784; 317 NW2d 564 (1982).

On direct appeal, Appellee did not claim that any portion of the charge impermissibly shifted the prosecution's burden of proof. People v Merlo, 23 Mich App 694 (1970). In Michigan, the failure to raise, argue or brief an issue on initial appeal precludes subsequent review. People v George, 375 Mich 262; 134 NW2d 222 (1965); People v Tubbs, 64 Mich App 341, 347; 236 NW2d 77 (1975).

Respondent finally raised his Sandstrom claim on delayed appeal. The Michigan appellate courts responded with cryptic refusals to exercise discretionary review. GCR 1963, 803.3; 853.1.

In these circumstances, the principles set forth in Wainwright v Sykes, supra, bars federal habeas corpus consideration of Petitioner's constitutional claim absent a demonstration of "cause" for the procedural default and actual prejudice as a result of the error.

In People v Wright, 408 Mich 1; 289 NW2d 1 (1980), the Michigan Supreme Court ignored the absence of contemporaneous objection in order to reach the merits of a Sandstrom-type error. The court recognized this action as a departure from the general rule but justified it on the grounds that reliance on defense objection and case-by-case assessment of harm "...may inadequately deter continued use of the instructions". Id., 408 Mich 30, n. 13 (emphasis added). Properly read, Wright represents a 1980 policy decision to create a narrow exception to the state contemporaneous objection rule for certain types of instructional errors. It does not conclusively indicate that a 1975 Michigan appellate court, on discretionary appeal, would have ignored GCR 1963, 516.2, to address a pre-Sandstrom claim that presumed intent language in a jury instruction was violative of due process.

Subsequent to its decision in Wright, the Michigan Supreme Court held that Sandstrom applied retroactively to those cases where

such instructional claims were pending on direct appeal as of Sandstrom's decisional date. People v Woods, 416 Mich 581, 621 (1983). Woods is consistent with Wright to the extent that the absence of a contemporaneous objection at trial in such cases would not preclude review. But neither decision suggests that cases tried prior to Sandstrom were immune to then applicable caselaw and procedural rules with regard to such errors.

In light of Woods,therefore, the issue is whether there was a controlling state procedural rule at the time of Appellee's default. Washington v Harris, 650 F2d 447, 451 (CA 2, 1981). It does appear that Michigan appellate courts generally applied GCR 1963, 516.2, to claims of impermissible burden shifting instructons prior to Wright. People v Spalding, 42 Mich APp 492, 495-496; 202 NW2d 450 (1972) [alibi instructions]; People v Williams #2, 45 Mich App 630, 640-641; 207 NW2d 180 (1973) [use of deadly weapon implies malice]; Hawley, supra, 112 Mich App at 787-788.

Appellant submits that Wright represents a decision to relax Michigan's procedural requirements in order to establish a principle of law for subsequent cases. Similarly, Woods stands as a choice to waive contemporaneous objection rules for a specific category of cases. But the policy factors that prompted these decisions do not compel their extension of a matter of constitutional law. In Hankerson v North Carolina, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977), this court addressed the

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> "The states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."
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This position has been recently reaffirmed in Engle v Isaac, 456 US 107, 134, n. 43; 102 S Ct 1558; 71 L Ed 2d 783 (1982).

Only if ~~the state~~ courts in this case ignored the procedural default and reached the merits of Appellant's constitutional claim is federal habeas review appropriate. County Court of Ulster County v Allen, 442 US 140, 152-154; 99 S Ct 2213; 60 L Ed 2d 777 (1979); Castaneda v Partida, 430 US 482, 485, n. 4; 97 S Ct 1272; 51 L Ed 2d 498 (1977). Where, as here, the reasons for the state court decision are not explicit, a determination of reliance on procedural default requires consideration of all relevant criteria. These considerations include examination of similar cases, review of the history of the case at bar, and analysis of the language employed by the state court opinions. Ulster County Court, supra, 442 US 140 at 147-154.

Here, the Michigan Court of Appeals declined review due to lack of "merit" in the grounds presented and the Michigan Supreme

Court thereafter refused relief "because the Court is not persuaded that the questions presented should be reviewed by this Court". Both orders appear to be standard forms for denial of delayed appeals and does not reveal the basis for decision. See Raper v Mintzes, 706 F2d 161, 164 (CA 6, 1983). In context, therefore, the use of the word "merit" in the Court of Appeals order is indicative of only summary consideration of the merits necessitated by the "manifest injustice" exception to the contemporaneous objection rule embodied in GCR 1963, 516.2. See Williams v Abshire, 544 F Supp 315, 319 (ED Mich, 1982); see also Ziegler v Callahan, 659 F2d 254, 271, n. 11 (CA 1, 1981); Murray v Superintendent, 651 F2d 451, 455, n. 6 (CA 6, 1981). This Court, however, has recognized that the existence of state plain error rules will not preclude the applicability of Wainwright, supra. Engle, supra, 456 US 125, n. 27; United States v Frady, 456 US 152, 177-178; 102 S Ct 1584; 71 L Ed 2d 816 (1982) (Blackmun, J., concurring).

An ambiguous silence alone does not imply that the state tribunals reached the merits of Appellant's claim. The Florida courts were silent on the merits of the peitioner's confession claim in Wainwright, supra, 433 US 72, 85-86. Similarly, in Perini v Bell, a companion case to Engle, supra, this Court enforced Ohio's procedural bar where petitioner had failed to raise his constitutional claim of instructional error at trial or on direct appeal. Engle v Isaac, 456 US at 124.

To hold otherwise would indulge a presumption that the state courts have waived procedural requirement in every instant of

denial of discretionary review absent express and specific reliance thereon as to the particular claims. Interpretation of inevitable ambiguity in this fashion undercuts the state's ability to enforce its procedural rules. For example, a state defendant who has failed to raise a trial objection withholds his or her claim on direct appeal and thus effectively deprives the state court of the option of either rejecting the claim on procedural grounds or addressing the merits. The state defendant next exhausts the claim when the courts subsequently refuse to exercise discretionary review. In the federal habeas forum, the petitioner then asserts that procedural default was not the reason for denial of review. For the reasons of comity, finality and societal cost set forth in Wainwright and Engle, this Court must not countenance such a result.

Given state enforcement of a valid procedural rule in this case, the next step in the Wainwright inquiry is whether Appellant can demonstrate "cause" for the default.

Though it appears unlikely that his objection would have been successful in a 1967 Michigan trial court, see Woods, supra, futility alone is no excuse. Engle v Isaac, supra, 456 US at 130. Nor can Appellant claim lack of awareness. It is evident that the constitutional foundation for his argument--that due process requires the state to provide all elements of a crime beyond a reasonable doubt--had been recognized prior to his trial. In re Winship, supra; see also Morissette v United States, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952). Moreover, federal decisions

had found impermissible burden shifting effects in similar instructions. Mann v United States, 319 F2d 404, 409 (CA 5, 1963); Stump v Bennett, 398 F2d 111 (CA 8), cert den, 393 US 1001 (1968). Petitioner thus had the "tools to construct [his] constitutional claim" at the time of his trial. Engle, at 133. Wainwright forecloses habeas corpus review in these circumstances.

ARGUMENT II

EVEN IF VIOLATIVE OF SANDSTROM V MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Introduction

In Connecticut v Johnson, ____ US ____; 103 S Ct 969; 74 L Ed 2d 823 (1983), eight justices of the U. S. Supreme Court divided as to whether a violation of Sandstrom could be harmless constitutional error. Four justices opined that an affirmative concession of intent by the defendant was necessary to render a Sandstrom error harmless. Id., 74 L Ed 2d at 834. The alternative plurality suggested that conclusive evidence of intent should preclude reversal despite a Sandstrom violation. Id., 74 L Ed 2d at 842. The present case revisits this debate.

It is Appellant's position that a harmless error analysis of Sandstrom violations requires a careful assessment of the particular trial context. This review entails a non-mechanistic consideration

of the precise language used by the trial court, the emphasis given to the instruction at issue, the issues actually contested by the defense and the weight of the prosecution's case. Undue emphasis on any single factor distorts the reality of the trial. The focus instead must remain on whether the procedural error "contributed to the conviction". Chapman v California, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967), quoting Fahy v State of Connecticut, 375 US 85; 84 S Ct 229; 11 L Ed 2d 171 (1963). Assessment of such error mandates a consideration of the entire record. United States v Hastings, ____ US ____; 103 S Ct 1974; 76 L Ed 2d 96, 106-107, n. 7 (1983).

A. Instructional Language

The mere use of the word "presume" in a jury instruction on intent does not necessarily generate a Sandstrom violation. The problem in Sandstrom was that the trial court failed to explain or otherwise qualify the presumption. 61 L Ed 2d 46. Left to speculate, a reasonable juror might have interpreted the instruction as either conclusive on the issue of intent or, minimally, affecting a shift of the burden of persuasion to the defendant.

The Sandstrom varient utilized in Connecticut v Johnson was less ambiguous. The clarification, however, proceeded in the wrong direction. The language used by the court explicitly told the jury that the presumption was conclusive. Connecticut v Johnson, supra, 74 L Ed 2d at 829. Such direction certainly increases the likelihood of prejudicial impact on the fact finding process.

It is essential, therefore, to focus on the exact language involved in a particular case. County Court of Ulster County v Allen, supra, 442 US at 157-158, n. 16.

A number of lower courts have recognized that not all Sandstrom type instructions embody the same potential for harm. They have carefully examined the precise language for "rhetorically inconsistent", Sandstrom, supra, 442 US at n. 7, qualifications or explanations. Some have found that particular words eliminate the constitutional violation as a threshold matter. Others telescoped their linguistic analysis into a harmless error inquiry.

These courts properly recognize that a contextual interpretation consistent with the principles of Cupp v Naughten, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1972), is essential to evaluations of a claimed Sandstrom violation. Courts on review must assume that jurors will endeavor to effectuate all the trial judges' instructions in a common sense manner. Undue, legalistic emphasis on narrow portions of the charge is artificially contrary to this realistic assumption.

With these matters in mind, a review of the precise language used in this case reveals a far less detrimental charge than the one found erroneous in Sandstrom.

The instruction in the instant case reads as follows:

"The law presumes that every person, unless relieved by some disability as hereinafter

> mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that death of the deceased was designed by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used. (T, 601-602)

The instructions have strong conditional clauses at the heart of the instruction.

Absent a mandatory character, the question remains whether the instruction in this case could have been interpreted as burden shifting. This Court, however, has recognized a distinction between presumptions that simply shift the burden of production as opposed to the ultimate burden of persuasion. County Court of Ulster County, supra, 442 US at 157, n. 16. In this case any doubts relevant to the ultimate burden generated by the rule of thumb language should have been resolved by the Court's specific reminder of the reasonable doubt standard.

For these reasons, Appellee submits that the instruction at issue in this case did not violate Sandstrom. But, even if review

reveals the possibility of juror misinterpretation sufficient to invoke Sandstrom, the above analysis illustrates the importance of complete contextual interpretation and is helpful to define the potential for prejudice. Appellee submits that such potential is demonstrably less in this case than appears in either Sandstrom or Connecticut v Johnson.

B. Degree of Emphasis

Where constitutional error receives particular prominence at trial, the possibility of harmlessness diminishes. In Bollenbach v United States, 326 US 607; 66 S Ct 402; 90 L Ed 350 (1946), for example, the last thing a potentially deadlocked jury heard was an unconstitutional presumption as an answer to their specific request for guidance on the issue. Similarly, the "machine gun repetition" of Griffin v California, supra, violations was highly significant to the nonharmless error determination in Chapman, supra, 386 US at 27.

In this case, the alleged constitutional violation involves a single terse sentence buried in 12 pages of instructions that took the court approximately fifty-four minutes to read. In these circumstances, there is no basis for a conclusion that a jury would accord special significance to this comment.

C. Materiality of the Intent Issue

A plurality of this Court in Connecticut v Johnson suggested that a Sandstrom error might be harmless where the trial defense

effectively concedes the issue of intent. To various degrees, other courts have also focused the primary emphasis of their harmless error inquiry on whether intent was a disputed or material issue in the case. See Conway v Anderson, 698 F2d 282, 285 (CA 6, 1983) (and cases cited therein); McGuinn v Crist, 657 F2d 1107, 1109 (CA 9, 1981); United States v Winter, 663 F2d 1120, 1144-1145 (CA 1, 1981).

A reasonable harmless error approach is to simply examine the degree to which intent was a significant issue in the case. Where intent, though technically in dispute, was clearly subsidiary to another claim of defense, the likelihood of harm from a Sandstrom instruction decreases dramatically. The contrary requires a speculative assumption that a jury which rejects a hotly contested defense claim will then base conviction on ambiguous instructional language.

The case at bar is illustrative. Here the defense claimed intoxication. Under then applicable Michigan law the defense had to establish that, due to intoxication, Defendant either (1) was not capable of knowing he was doing wrong, or (2) lacked the power to resist the impulse to violate the law. People v Finley, 38 Mich 482, 483 (1878). People v Martin, 386 Mich 407, 418; 192 NW2d 215 (1972). Voluntary intoxication was not recognized as a defense in the sense that it could negate general criminal intent. Id., at 484; People v Wright, 58 Mich App 735, 739; 228 NW2d 807 (1975). In this case, the defense sought to demonstrate that Plaintiff killed

in the heat of passion, and was unable to control his own emotions and that because of his drunkenness, was thus unable to form the intent to kill another person (T, p. 585-586, 589).

The Court specifically instructed the jury that:

> "If on the other hand, you find the killing was done during a state of intoxication such that the Respondent was unable to form the intent required to commit the crime and under the instructions I have given you, then your verdict should be that he is not guilty." (T, p. 605)

The above was at the end of the Court's instructions to the jury. This instruction clearly addresses the defense's sole challenge to the prosecution's proofs as to general criminal intent. (Appellee's contention that he was drunk and was thus unable to form the requisite intent).

In this context, a Sandstrom instruction on intent would have been virtually meaningless to a lay jury.

D. Weight of the Evidence

Closely related to the materiality of the intent issue is the scope and extent of the proofs presented on this issue at trial. Frequently, the reason for nondispute lies in an accurate assessment of the prosecution's case.

Appellant again does not assert that the weight of the evidence is the sole test for harmless instructional error. It is simply an important step, Holloway v Arkansas, 435 US 475, 488; 98 S Ct 1173; 55 L Ed 2d 426 (1978), in the assessment of "...the probable impact of the [error] on the minds of an average jury." Harrington v California, 395 US 250, 254; 89 S Ct 1726; 23 L Ed 2d 284 (1969). This step is especially crucial where the apparent error rests on the mere possibility of juror misinterpretation.

In the instant case, even the District Court concluded that the proof in the instant case that Appellee murdered his estranged wife was strong (page 6 of District Court Opinion). The District Court granted the Petition, however, and in support cited several matters in the record it considered relevant.

The District Court first noted that Appellee had testified that before going to see his wife, he had consumed eight shots of whiskey with beer chasers (Trial Volume II, pages 457, 545-548). It should be noted, however, that the jury was specifically instructed that if they found that the killing was done during a state of intoxication such that Appellee was unable to perform the intent required to commit the crime, then their verdict should be not guilty (See Argument IIC above).

In its Opinion, the District Court also notes that Appellee's counsel, in his closing argument, stated that: "I submit that he could not have formed the intent. He could not have premeditated this killing." (Trial Volume II, page 564). It should be noted, however,

that this statement is apparently based upon the erroneous notion that he must have planned the killing before going to the beauty shop. Under Michigan law, there must simply be a sufficient opportunity for a "second look". This may entail a matter of seconds or minutes, depending upon the totality of the circumstances surrounding the killing. People v Tilley, 405 Mich 38 (1979). Thus, it is not necessary that Appellee had formed the intent to kill his estranged wife before he went to the beauty shop as his counsel appears to suggest. It should also be noted that the argument of defense counsel addresses the issue of premeditation and not the intent to kill. Thus, he simply addresses the issue of premeditation and deliberation which distinguishes murder in the first degree from murder in the second degree and is defined independently of malice (the general intent to kill his wife). People v Milton, 81 Mich App 515 (1978); People v Langworthy, 416 Mich 630 (1982).

In further support of the District Court's decision to grant habeas, the Court cites Appellee's claim that his wife's slapping and spitting on him caused him to go into a "rage" (Transcript Volume II, page 464). This is, of course, disputed by the testimony witnesses (T, 238-239, 266). However, rage does not show a lack intent, but may merely indicate the basis for the intent. Appellee's al counsel, in fact, apparently attempts to argue that the killing justifiable and that it was provoked (Trial Volume II, page 381). Michigan law, provocation does not negate intent. Instead, ation may mitigate the degree of the offense to manslaughter. v VanWick, 402 Mich 266 (1978); People v Langworthy, supra,

p. 652. The argument by defense counsel that there was provocation is therefore not relevant to the issue of intent. Assuming the jury accepted the evidence regarding provocation, it could normally be used to mitigate the degree of defense to manslaughter. People v VanWick, supra.

A review of the District Court's analysis reveals that the portions of the record relied upon by the Court does not support its conclusion. The record instead reveals that general intent (malice) was not in dispute. The defense instead relied upon lack of premeditation, provocation and drunkenness.

Any reasonable juror who believed Appellee had shot the decedent four times and was not legally incapacitated at the time could not possibly conclude that he lacked the requisite general intent. An ambiguous intent instruction pales to insignificance where the evidence itself is conclusive.

CONCLUSION

WHEREFORE, Respondent-Appellant respectfully requests this Court reverse the decision of the District Court and remand for further proceedings.

Respectfully submitted,

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Dated: April 25, 1985

No. 86-1118

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN MERLO,

Petitioner-Appellee,

-vs-

DAN BOLDEN,

Respondent-Appellant.

MOTION TO STRIKE APPELLANT'S ARGUMENT II RELATING TO RETROACTIVITY AND/OR ARGUMENT III, OR ALTERNATIVE RELIEF

NOW COMES John Merlo, Petitioner-Appellee, by and through his attorney, Frank Lawrence and states:

Strike Argument II and/or Argument III

1. On January 28, 1985, District Court Judge Stewart A. Newblatt issued a conditional writ of habeas corpus due to a burden shifting Sandstrom jury instruction.

2. Appellant's arguments before the District Court were: 1.) There was a Wainwright v Sykes procedural default by appellee 2.) The jury instruction error was not a Sandstrom error, and 3.) Even if the jury instruction at issue was unconstitutional, it was harmless beyond a reasonable doubt.

3. Appellant appealed the decision of the District Court. Notice of Appeal was filed with this Court on February 8, 1985.

4. On appeal before this Court, case number 85-1145, appellant raised the same three primary issues raised in the Court below. Oral arguments were heard on August 26, 1985.

5. On or about September, 1985 this Court remanded the Wainwright v Sykes procedural default issue to the Court below.

6. On remand, the only issue brief and argued was Wainwright v Sykes procedural default.

7. On December 27, 1985 the Court below held in favor of appellee that there was in fact no Wainwright v Sykes procedural default.

7. On Januray 23, 1986 the appellant filed a Notice of Appeal with this Court regarding the District Court's remand decision on Wainwright v Sykes procedural default. Appellee also appealed the harmless error issue again, presumably because this Court did not explicitly address that issue in its prior opinion remanding the cause. Appellee also raised an issue whether Sandstrom should be applied retroactively in appellee's case.

9. The retroactivity issue was not presented to the District Court in the past, in either appearance before that Court.

10. Appellant's Argument III does not argue the Wainwright v Sykes procedural default issue. Appellant does not argue that the Wainwright v Sykes bar has not been waived, in opposition to the lower Courts holding. Instead, appellant argues that despite a waiver of the Wainwright v Sykes bar, because appellee is on collateral

attack rather than direct appeal, United States v Frady, 456 US 152, 102 SCt 1584, 71 L Ed 2d 816 (1982) nevertheless requires appellee to show cause and prejudice. This is a new issue that could have been presented to the Court below but was not. The Court below acted properly in never passing on such a new issue.

11. This Court should not pass upon the retroactivity Argument II or Argument III since they were not raised in the Court below and appellant is precluded from ever raising the issues again. Bannert v American Can Company, 525 F2d 104, 111 (CA 6, 1975) citing Hormel v Helvering, 312 US 522, 556, 61 S Ct 719, 85 L Ed 1037 (1941) and Schneider v Electric Auto-Lite Company, 456 F2d 366, 375 (CA 6, 1972); See also Williams v United Distributive Workers Council 30 AFL-C10 (Silvercup Bakeries), 529 F2d 509, 510 (CA 6, 1976); Lyons v United States, 123 F2d 507 (CA 6, 1941); United States v Oritz, 422 US 891, 898, 95 S Ct 2585, 45 L Ed 2d 623 (1975).

Alternative Relief

12. If for some unforseen reason this Court does not strike the retroactivity Argument II, appellee requests that this Court allow appellee to submit a supplemental brief on that issue.

Wherefore, appellee respectfully requests this Court to strike appellant's Argument II on retroactivity and/or Argument III.

Respectfully submitted,

Frank Lawrence (P36839)
Attorney for Petitioner-Appellee

Dated: May 5th, 1986

Frank Lawrence, P.C.
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STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

On this 5th day of May, 1986 before me, the undersigned, a Notary Public in and for said County, personally came the above-named Frank Lawrence, who subscribed the foregoing Motion to Strike, who being by me duly sworn, says that he had read the said Motion to Strike and knows the contents thereof, and that the same in true of his own knowledge, except as to those matters therein stated to be upon his information and belief, and as to those matters he believes them to be true.

Suzanne L. Lawrence
Suzanne L. Lawrence Notary Public
INGHAM County, Michigan
My Commission Expires: 3-6-88

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

86-1118

JOHN MERLO,

Petitioner-Appellee,

-vs-

DAN BOLDEN,

Respondent-Appellant.

_____/

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
No. 86-1118

JOHN MERLO,

Plaintiff-Appellee,

-vs-

DAN BOLDEN,

Defendant-Appellant.

_____/

APPELLANT'S BRIEF

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NITED STATES COURT OF APP S
FOR THE SIXTH CIRCUIT

FACT SHEET FOR STATE HABEAS CORPUS APPEALS (§2254)

Case Name and Number: JOHN MERLO V DAN BOLDEN #86-1118
Person Reporting: Respondent-Appellant, Dan Bolden

1. Has this conviction(s) been previously litigated in the U. S. Courts? (x) Yes ( ) No. If so, give brief history.

State appealed grant of habeas corpus in case No. 85-1145. This Court remanded to district court for consideration of procedural default.

2. Constitutional violation claims: name constitutional provision and briefly recite facts asserted as violative.

a. Due process clause of Fourteenth Amendment is claimed to have been violated by burden-shifting instruction - issue - does harmless error doctrine apply?

b.

c.

3. Have remedies been exhausted as to claims listed above?

a. Yes

b.

c.

4. Are there fact disputes concerning claims? ( ) Yes (xx) No. If so, were they resolved by the District Court?

a. At hearing?

b. By review of state court record?

c. By reference to Magistrate?

d. Neither, i.e., not resolved.

5. Does the State argue that any constitutional violation was found harmless beyond reasonable doubt. If so, briefly state why and cite to appendix pages claimed as proof.

Yes, harmless error is argued because the evidence of intent is conclusive. Consequently, an implied malice instruction could not affect the jury verdict.

FORM 6CA-57
5/81

STATEMENT OF ISSUES PRESENTED

I. WHETHER, ALTHOUGH VIOLATIVE OF SANDSTROM V MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT IN THE INSTANT CASE?

Respondent contends the answer should be, "Yes."

Petitioner contends the answer is, "No."

II. WHETHER SANDSTROM SHOULD BE APPLIED RETROACTIVELY TO JUDGMENTS OF CONVICTION THAT WERE FINAL WHEN SANDSTROM WAS DECIDED?

Respondent contends the answer should be, "Yes."

Petitioner contends the answer is, "No."

III. WHETHER THE WAINWRIGHT V SYKES BAR SHOULD APPLY TO THIS CASE?

Respondent contends the answer should be, "Yes."

Petitioner contends the answer is, "No."

STATEMENT OF FACTS

Petitioner Merlo was convicted in state court of first-degree murder, MCLA 750.316, in 1967 by a jury trial. Petitioner was sentenced to mandatory life imprisonment and has been incarcerated since his conviction. The Michigan Court of Appeals affirmed his conviction in an opinion which found the evidence of premeditated murder to be overwhelming. People v Merlo, 23 Mich App 694, 703 (1970). The Michigan Supreme Court denied Merlo's delayed application for leave to appeal on October 27, 1975. A 1977 application for writ of habeas corpus was denied. The jury instruction now in question was not challenged in any of these proceedings.

In 1982, Petitioner first raised the Sandstrom violation in a delayed motion for new trial. The motion was denied. In mid-1983, the Michigan Court of Appeals denied his delayed application for leave to appeal. The Michigan Supreme Court denied leave in late 1983.

The United States District Court first granted Petitioner's writ of habeas corpus in January, 1985. The district court found the jury instruction violated Sandstrom v Montana, 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979), and that this error was not harmless. On appeal, this Court, without ruling on harmless error, remanded to the district court for consideration of procedural default. The district court found the state courts had not relied on Petitioner's failure to object to preclude state court appellate review, and that Wainwright v Sykes, 433 US 73, 97 S Ct 2497, 53 L Ed 2d 594 (1977), did not apply. The

district court again granted Petitioner's application for writ of habeas corpus. The Respondent appeals.

At trial, Petitioner Merlo did not contest the fact that he shot his wife four times in the beauty shop where she was working. As defense counsel stated in a pretrial motion, "The facts are such that the shooting is hard to be denied, and the defense must be that there was no premeditation." (T, 99)

Rose Marie Schmidt, a beauty shop customer, saw Petitioner Merlo arrive. (T, 111) Merlo and his estranged wife, Sharon, a hairdresser, went into the furnace room. (T, 113) The doors to the furnace room were open. Merlo and his wife were back there about five minutes or so. Rose Marie was five feet from the open doors but did not hear any sounds. (T, 114) Sharon came out and went to work on another customer. Merlo came out and shot Sharon. He fired two of the shots after Sharon was on the floor. (T, 115) Merlo walked out of the shop. His gait was normal. (T, 115)

Another customer, Diane Brennan, also saw Merlo walk into the shop and go into the back room with his wife. (T, 160) Merlo and the victim were very quiet. (T, 164) Diane tried to listen to their conversation. (T, 181) She saw Merlo shoot his wife. Merlo was three to four feet from the victim, used a chrome pistol, and never said a word. (T, 166)

Andrea Pojarski was a hairdresser in the shop. (T, 188) She saw Merlo come in, she exchanged casual greetings with him. (T, 189) Andrea heard Sharon ask Petitioner, "What are you doing here? Why don't you go home?" (T, 190) Andrea saw Sharon come

about three weeks before the shooting. (T, 258)

Dr. Richard E. Oleson testified that Sharon Merlo had been shot four times. One shot struck the midline front of her skull. It severed the brain stem, causing instant death. (T, 151-152) One shot struck at the midline base of the neck at the upper end of the breast bone. It passed through the large artery from the heart and through the windpipe. (T, 151-152) Either of these shots would have been fatal. (T, 153) Two more shots struck in the front abdomen. There were corresponding exit wounds. (T, 151) Merlo was in the army for three years. (T, 419)

About three weeks after the murder, Merlo was arrested in Philadelphia by a bank detective when Merlo attempted to cash a forged check. Merlo was carrying the murder weapon when he was arrested. (T, 303, 315)

Merlo confessed to the Philadelphia authorities that he had shot his wife four times. He said she was working on a lady's hair when he fired. (T, 343-345)

Diane Wilshire, Sharon's sister, testified that Merlo hit Sharon once and broke her glasses. Merlo was not barred from the house (where Sharon lived with her parents). Merlo always left the house quickly so he could avoid being served with the divorce papers. (T, 414) Merlo visited Diane in the hospital and showed her his gun. He told her he was not afraid of anyone. (T, 415)

Petitioner Merlo testified that prior to the murder he saw his wife's car parked at her boyfriend's apartment. Merlo

smashed up the dashboard of his wife's car and pulled out the spark plug wires. (T, 451) He said he used a .38 caliber gun to smash the gauges and the bullet flew out of the gun. He did not leave it on the seat. (T, 515) The day of the murder, he had eight shots and beers in an hour and went straight to the beauty shop. (T, 457) During his talk with Sharon in the back room of the beauty shop, she called him a punk and spit in his face. It enraged him so he shot her. (T, 463-464) The boyfriend was part ot it. (T, 538)

Several months after the murder, Petitioner telephoned the victim's mother. He said, "I'm not sorry I did it. I warned her ahead of time. I left a bullet in the front seat. I haven't shed a tear over it." (T, 553-554)

Additional facts are stated in the body of the brief.

ARGUMENT

I. ALTHOUGH VIOLATIVE OF SANDSTROM V MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT IN THE INSTANT CASE.

In Connecticut v Johnson, 460 US 73, 103 S Ct 969, 74 L Ed 2d 823 (1983), the Court divided equally on the question of a Sandstrom violation ever being harmless error. Four justices held that an affirmative concession of intent by the defendant was necessary to render a Sandstrom violation harmless. Justice Stevens never reached the issue of harmless error. He concurred in the opinion of the first four justices because it allowed the opinion of the Connecticut Supreme Court to stand. Four other justices held that conclusive evidence of intent can preclude reversal despite a Sandstrom violation.

The plurality stated that if a Sandstrom violation touches a disputed element of the crime charged, it renders the evidence on the issue irrelevant "because the jury may have relied upon the presumption rather than upon the evidence." Connecticut v Johnson, 74 L Ed 2d at 833. The dissent stated that the proper inquiry was not "whether the presumption was unnecessary to the jury verdict 'in the sense that the evidence was sufficient for a properly instructed jury to find that respondent acted with the requisite intent.' . . . The proper inquiry is 'whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.'" Connecticut v Johnson, 74 L Ed 2d at 841, n 5.

The approach used by the dissent is in accord with the approach used by this Court, i.e., a Sandstrom violation is

harmless error only if no rational juror could have concluded from the evidence of record that the defendant lacked the requisite intent. Conway v Anderson, 698 F2d 282, 285 (CA 6, 1983)

In the instant case, the opinion of the district court which deals with harmless error does not show any evaluation of the evidence introduced by the prosecutor. There is no mention of any evidence that goes to intent. Instead, there is a recitation of Petitioner Merlo's defense. The district court's recitation includes statements by Merlo's trial lawyer and statements from Merlo's testimony. By ignoring the evidence of intent, the district court improperly applied the harmless error analysis mandated by Conway v Anderson, supra.

Respondent knows that it is more difficult to have a Sandstrom violation held harmless in cases where the defense interposed goes to the element of intent. Burton v Bergman, 649 F2d 428 (CA 6, 1981), vacated and remanded on other grounds, 456 US 953, 102 S Ct 2026, 72 L Ed 2d 478 (1982). Rather than the approach used by the district court, a thorough examination of the evidence of intent in the instant case is necessary.

The victim, Sharon Merlo, was a hairdresser in a beauty shop in Farmington Township, Michigan. On the morning of January 6, 1967, Sharon Merlo, four customers, the beauty shop owner, another hairdresser, and the young son of one of the customers were in the shop. Petitioner, John Merlo, walked into the shop. When the owner asked him how he was, he said he was fine. He motioned to Sharon to go into the back room with him. The back room had two doors; both remained open while Petitioner was in the shop.

Sharon followed Petitioner into the room, came back out shortly after that, lit a cigarette, and returned to the room. Petitioner and Sharon were in the room about five minutes or so. During this time, they remained close to the open doors. While they were in there, the owner went in the room twice and the other hairdresser went in once. Neither of these two women nor any of the customers ever heard any loud talking or shouting. No one heard any slaps.

Sharon came out of the back room, went to her customer, got behind the customer's chair, and put her hand on the customer's shoulder. By this time, Petitioner had walked out of the back room and was standing two feet in front of the customer's chair. His arm was extended before him. He fired four shots in all, two of them after Sharon was either on the floor or slumping down.

Petitioner walked out of the shop, drove his rented car to Cleveland where he abandoned it. (T, 345) He took a train to New York, changed trains, and arrived in Philadelphia less than 24 hours after shooting his wife. (T, 345) He checked into an inexpensive hotel. (T, 345) He was arrested about three weeks later in a Philadelphia bank while attempting to cash a forged check. (The reason for his arrest was not put before the jury.) Petitioner confessed to the Philadelphia police that he shot his wife four times. He was carrying the murder weapon when he was arrested.

About two months before the murder, Sharon had filed for divorce. After this, Petitioner saw his wife's car parked near her boyfriend's apartment. He smashed up the gauges on the

dashboard and pulled out the spark plug wires. He left a .38 caliber bullet on the front seat as a warning. Petitioner testified he always carried ten shells for his .38 in each pocket. (T, 514

Also prior to the murder, Petitioner visited Sharon's sister, who was in the hospital after giving birth. Petitioner showed her his gun and said he was not afraid of anyone.

Petitioner had moved back to his hometown of Niles, Ohio, after his wife filed for divorce. (T, 454) He sold the .38 in Niles and bought a .32. (T, 515) He rented a car, drove to Michigan after work on Friday evening, January 5, 1967. (T, 456) He stayed in a motel that night. (T, 456) Sometime between 10:30 and 11:00 the next morning, Petitioner shot his wife four times with the .32.

One entry wound was at the midline front of her skull. It severed the brain stem, and caused instant death. A second entry would was at the midline base of the neck at the upper end of the breast bone. It passed through the large artery from the heart and through the windpipe. This shot would have been fatal by itself. There were two entry wounds to the front of the abdomen with corresponding exit wounds. Petitioner was familiar wtih guns -- he was in the army for three years.

Petitioner testified he had consumed eight shots and beers before going into the beauty shop. (There was no testimony that he smelled of alcohol. There was no testimony that he staggered. His walk was described as normal.) Petitioner testified that he and his wife argued in the back room, she slapped him and spit in his face. (No one heard any loud talking or shouting. No hairdryers were going. (T, 120) There was no

testimony that anyone heard any slaps. No one saw any marks on Petitioner's face. No one saw any moisture on Petitioner's face.)

Petitioner testified that when his wife called him a punk and spit in his face, it enraged him so he shot her. (Testimony showed that when Petitioner caught his wife and her boyfriend necking in a car, Petitioner stuck his head in the window to inquire how they were doing - T, 436 - and if they were having fun - T, 506.) Petitioner never said the amount of alcohol he consumed in any way affected his ability to reason. (It apparently did not affect his flight to Philadelphia, either.)

Petitioner's confession to the Philadelphia authorities did not include any reference to arguing or to being slapped or spit upon.

These are the facts that were presented to the jury. Respondent contends that no rational juror could have concluded that Petitioner lacked the requisite intent to murder. The Sandstrom violation was harmless beyond a reasonable doubt.

This Court recently found a Sandstrom violation to be harmless beyond a reasonable doubt in Logan v Abshire, 778 F2d 283 (CA 6, 1985). The defendant was convicted of armed robbery and first-degree murder for the fatal shooting of the store owner. His defense was intoxication. A jury instruction which violated Sandstrom was given at trial.

This Court reviewed all the evidence. Defendant had made a confession to authorities where he admitted planning the robbery. This confession included his statement that he was not under the influence of drugs or alcohol. This Court noted that

the case had been well tried and the evidence before the jury proved a planned and deliberate robbery during which the owner was fatally shot. This Court held the Sandstrom violation harmless because no rational juror could have concluded that the defendant lacked the requisite intent.

The same finding should be made in the instant case. This case was well tried. The evidence shows this was a planned, deliberate murder. Petitioner had a .38 caliber pistol. He showed that pistol to his wife's sister. He left a .38 caliber bullet as a warning on his wife's car seat. Then he moved to Ohio, sold the .38, and he bought a .32. He rented a car and drove from Niles, Ohio to Detroit, Michigan after work on Friday evening. He shot his wife four times the next morning and eluded capture for about three weeks. His voluntary statement to police omitted any and all reference to what he would offer at trial as his defense. The testimony of the eyewitnesses did not corroborate a single point of Petitioner's defense. No rational juror could have concluded that Petitioner lacked a premeditated and deliberated intent to kill. The Sandstrom violation committed at this trial was harmless beyond a reasonable doubt.

In Francis v Franklin, 471 US ___, 105 S Ct ___, 85 L Ed 2d 344 (1985), the Court found an instruction which shifted the burden of proof to the defendant to be violative of Sandstrom. The court below had found that the Sandstrom violation could not have been harmless error. The defense was accident, and the evidence of intent was not overwhelming. The Court affirmed the Court of Appeals on the harmless error question, noting that "[t]he primary task of this Court upon

review of a harmless error determination by the Court of Appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." Francis v Franklin, 85 L Ed 2d at 361, n 10. It does not appear from the district court's opinion that the court "undertook a thorough inquiry" into the evidence.

In addition to a thorough review of the evidence of intent, Respondent contends that the record should be examined in other respects as well. Whatever instructions were given to the jury should be reviewed and the Sandstrom instruction must be viewed in the context of all the instructions that were given. Cupp v Naughten, 414 US 141, 94 S Ct 396, 38 L Ed 2d 368 (1973).

The instruction given in the instant case which was found to violate Sandstrom is:

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that death of the deceased was designed by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used. (T, 601-602)

The underlined portions of the instruction condition the finding of guilt upon a review of the evidence. Respondent

contends these underlined portions are rhetorically inconsistent with the constitutionally infirm portions of the instruction. Sandstrom, 62 L Ed at 47, n 2. These conditional clauses auger in favor of finding the Sandstrom violation to be harmless error beyond a reasonable doubt.

A reasonable harmless error approach is simply to examine the degree to which intent was a significant issue in that case. Where intent, though technically in dispute, was clearly subsidiary to another claim of defense, the likelihood of harm from a Sandstrom instruction decreases dramatically. The contrary requires a speculative assumption that a jury which rejects a hotly contested defense claim will then base conviction on ambiguous instructional language.

In the instant case, one of the claimed defenses was intoxication. Under then applicable Michigan law the defense had to establish that, due to intoxication, the defendant either (1) was not capable of knowing he was doing wrong, or (2) lacked the power to resist the impulse to violate the law. People v Finley, 38 Mich 482, 483 (1878); People v Martin, 386 Mich 407, 418 (1972). Voluntary intoxication was not recognized as a defense in the sense that it could negate general criminal intent. Martin, supra, 484; People v Wright, 58 Mich App 735, 739 (1975). In this case, the defense sought to demonstrate that Petitioner killed in the heat of passion, and was unable to control his emotions and that because of his drunkenness, was unable to form the intent to kill another person. (T, 585-586, 589)

The trial court instructed the jury on provocation and explained how provocation reduces murder to manslaughter. (T,

599-600) The trial court instructed the jury on intoxication and its potential to preclude the formation of the necessary intent. (T, 600-601) Additionally, the trial court specifically instructed the jury:

> If on the other hand, you find the killing was done during a state of intoxication such that the Respondent was unable to form the intent required to commit the crime and under the instructions I have given you, then your verdict should be that he is not guilty. (T, 605)

This instruction was given at the end of the trial court's instructions to the jury. It clearly addressed the defense's challenge to the prosecution's proofs of the requisite intent. These instructions on the Petitioner's defense also weigh in favor of finding the Sandstrom error harmless beyond a reasonable doubt.

The instruction containing the Sandstrom violation should be considered along with the trial court's instructions defining first and second degree murder. After giving the common law definition of murder, the trial judge stated:

> If you come to the conclusion that the Respondent is guilty of murder, as I have defined it, it will be your duty to determine whether he is guilty of murder in the first or murder in the second degree. The difference between murder in the first degree and murder in the second degree is this: Murder in the first degree is a killing done wilfully and with premeditation, while in murder in the second degree the element of premeditation is absent. To convict the Respondent of murder in the first degree, it must appear that the killing was wilful and premeditated. It is not necessary that any definite period of time should have elapsed between the forming of such intention and the shooting which killed deceased, provided the shooting was premeditated and the Respondent acted wilfully.
>
> On the other hand, if the killing was done under a sudden impulse, without premeditation or previously formed intention, the offense would be

> murder in the second degree. As I have stated before, the difference between the two offenses is that, in murder in the first degree the element of premeditation is present, while in murder in the second degree it is not. (T, 597-598)

The jury was instructed that the burden of proof was on the prosecutor to establish guilt beyond a reasonable doubt. (T, 596) The jury was also instructed to consider the instructions as a whole and not to pick out one instruction and disregard the rest. Although these other instructions and the conditional clauses in the Sandstrom instruction may not "cure" the Sandstrom violation, Phillips v Rose, 690 F2d 79, 81 (CA 6, 1982), they do cut in favor of finding the violation to be harmless error beyond a reasonable doubt.

In Francis v Franklin, supra, Justice Powell wrote a dissenting opinion. Justice Rehnquist, with whom the Chief Justice and Justice O'Connor joined, also dissented. Both dissents examined the challenged instruction in the context of all the instructions as a whole. Both dissents found that the other instructions prevented the challenged instruction from impermissibly shifting the burden of proof to the defendant. The dissenting opinions held the challenged instruction consequently did not violate Sandstrom v Montana, supra.

In the instant case, the type of analysis used in the dissenting opinions of Francis v Franklin, supra, applied to the whole jury instruction in the instant case, will result in a finding that the Sandstrom violation was harmless beyond a reasonable doubt.

The type of consideration necessary for a reviewing court to employ on a claim of harmless constitutional error is best set forth in Williams v Engle, 683 F2d 152, 153 (CA 6, 1982):

> Whether constitutional error in a given case is harmless beyond a reasonable doubt, within the definition of that phrase under Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705 (1967), is not a question of mechanical application of sterile legal principles, but a sensitive judicial determination made upon a review of the record in the trial court considered as a whole, and in the light of the realities of the trial. The decision must be honestly made, with eyes open and with a full and mature appreciation of all of the circumstances which go to bear upon the ultimate verdict which was reached by the jury.

The district court's opinion does not show a thorough inquiry into the facts of the instant case or a careful assessment of the jury instructions as a whole. The district court instead relied singly upon Petitioner's asserted defense. The focus must remain on whether any rational juror could have concluded that the defendant lacked the requisite premeditated, deliberated intent to kill. Chapman v California, 386 US 18, 23-24, 87 S Ct 824, 17 L Ed 2d 705 (1967); Conway v Anderson, supra. Given the overwhelming evidence of Petitioner's intent, the Sandstrom violation was harmless beyond a reasonable doubt.

The district court decision should be reversed.

II. SANDSTROM SHOULD BE APPLIED RETROACTIVELY TO JUDGMENTS OF CONVICTION THAT WERE FINAL WHEN SANDSTROM WAS DECIDED.

Petitioner was convicted of first-degree murder in 1967. One dozen years later, in 1979, the Court decided Sandstrom. This Circuit has given Sandstrom full retroactive effect. Burton v Bergman, 649 F2d 428 (CA 6, 1981), vacated and remanded on other grounds, 456 US 953, 102 S Ct 2026, 72 L Ed 2d 478 (1982); Conway v Anderson, 698 F2d 282 (CA 6, 1983). The district court in the instant case applied Sandstrom retroactively.

Other circuits which have addressed this issue have also applied Sandstrom retroactively. Ramirez v Jones, 683 F2d 712, 717 (CA 2, 1982); Guthrie v Warden, Maryland Penitentiary, 683 F2d 820, 823, n 3 (CA 4, 1982); Dietz v Solem, 640 F2d 126, 130 (CA 8, 1981).

The Constitution does not compel or prohibit retroactive application of new constitutional rules. Linkletter v Walker, 381 US 618, 629; 85 S Ct 1731; 14 L Ed 2d 601 (1965). The determination involves a balancing of three factors: 1) the purpose to be served by the new rule, 2) the extent of reliance on the old rule, and 3) the effect on the administration of justice of retroactive application of the new rule. Stovall v Denno, 388 US 293, 297, 87 S Ct 1967, 18 L Ed 2d 1199 (1967). Although Sandstrom relied on prior cases which analyzed presumptions in light of the reasonable doubt standard, it represents neither a clean break with the past nor application of settled

precedent to a new factual situation.[1]

In Sandstrom, the Court found particular language in a jury instruction violated due process because there was a possibility that a reasonable juror could have considered the instruction conclusive or burden-shifting. The goal of Sandstrom was to eliminate even the remote chance of juror misrepresentation. In effect, Sandstrom represents a prophylactic rule designed to protect the reasonable doubt standard.

The Court has recognized that the extent to which the purposes of a new constitutional rule require its retroactive application are "necessarily a matter of degree". Johnson v New Jersey, 384 US 719, 729, 86 S Ct 1771, 16 L Ed 2d 882 (1966). Consequently, retroactivity is only appropriate where the former practice "presents substantial likelihood that the results of a number of those trials were factually incorrect", Williams v United States, 401 US 646, 655, n 7; 91 S Ct 1148; 28 L Ed 2d 388 (1971), "producing a clear danger of convicting the innocent". Tehan v United States ex rel Shott, 386 US 406, 416; 86 S Ct 459; 15 L Ed 2d 453 (1966).

The possibility of unreliable results due to a Sandstrom instruction depends upon the unlikely occurrence that an entire jury first perceives and then impermissibly interprets a single phrase in lengthy jury instructions. Even then, the instruction could only have significant impact where the issue of

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[1] Where a rule of criminal procedure has been expressly declared to be "a clear break with the past," Desist v United States, 394 US 244, 248, 89 S Ct 1030, 22 L Ed 2d 248 (1969), it is almost invariably held non-retroactive.

intent is a close question.[2] In cases where intent has not been placed at issue, a Sandstrom instruction cannot affect the fact-finding process. Sandstrom represents a situation that is fundamentally different in degree from previous cases where new rules implicating the reasonable doubt standard have received complete retroactive effect. In re Winship, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970), retroactively applied by Ivan v City of New York, 407 US 203; 92 S Ct 1951; 32 L Ed 2d 659 (1972); and Mullaney v Wilbur, 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508 (1975), held retroactive in Hankerson v North Carolina, 432 US 233; 97 S Ct 2339, 53 L Ed 2d 306 (1977). In both Winship and Mullaney, the rule that the state had the burden of proving each and every element of the offense beyond a reasonable doubt "was designed to diminish the probability that an innocent person would be convicted". Hankerson v North Carolina, 432 US at 242.

The difference in degree between the Sandstrom instruction rule and the rule in Winship and Mullaney justifies giving substantial weight to the other two Stovall factors, i.e., the extent of reliance on the old rule and the effect of the retroactive application of the new rule on the administration of justice. Consideration of these factors cuts strongly against retroactive application of Sandstrom. United States v Spiegel, 604 F2d 961, 969 (CA 5, 1979).

In People v Woods, 416 Mich 581 (1982), the Michigan

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[2] In the instant case, the evidence of intent is conclusive. No rational juror could have concluded the Petitioner lacked the requisite intent to kill. See Argument I, supra, and Argument III, infra.

Supreme Court closely examined Sandstrom and its predecessors, Winship and Mullaney, to determine whether Sandstrom should be retroactively applied. The Court first found that Sandstrom differed in great degree from Winship and Mullaney because the "truth-finding-function is not substantially impaired in a Sandstrom situation." Woods, supra, 620. The court then looked at the other two Stovall factors and held:

> The last two factors in the Linkletter-Stovall approach are the reliance on the old standards and the effect on the administration of justice. In Michigan, instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, People v Medley, 339 Mich 486; 64 NW2d 708 (1954); People v Hodges, 196 Mich 546; 162 NW 966 (1917); and by the Court of Appeals, People v Nelson, 35 Mich App 368; 192 NW2d 682 (1971); People v McBride, 30 Mich App 201; 186 NW2d 70 (1971). Conceivably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
>
> Given this reliance, the effect full retroactivity would have on Michigan's system of justice is unacceptable. Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. Taking this into consideration with the purpose of the Sandstrom rule, we feel full retroactivity is unwarranted.
>
> Woods, supra, 620-621; footnotes omitted.

The Court then limited the retroactivity of Sandstrom to those cases pending on direct appeal when Sandstrom was decided. Woods, supra, citing United States v Johnson, 457 US 537, 102 S Ct 2579, 73 L Ed 2d 202 (1982). In the instant case, Petitioner was convicted in 1967. His conviction was affirmed by the Michigan Court of Appeals in his appeal by claim of right in 1970. His application for leave to appeal was denied by the Michigan

Supreme Court in 1975. Sandstrom should not be retroactively applied to Petitioner. Such a retroactive application of Sandstrom puts a heavy burden upon the People of the State of Michigan to retry a murder case after a lapse of nearly twenty years.

The balance of factors favors limited retroactivity at best. Sandstrom should not be retroactively applied to cases where the judgment and all direct appeals were final by the date of Sandstrom's decision.

III. THE WAINWRIGHT V SYKES BAR SHOULD APPLY TO THIS CASE.

In United States v Sobell, 314 F2d 314, 324-325 (CA 2, 1963), Judge Friendly pointed out:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [Sunal v Large,] 332 U.S. at 182 . . ., but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. . . . When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

Petitioner Merlo was convicted of first-degree murder in a well-tried case in 1967. In 1979, Sandstrom held that the instruction given at Merlo's trial was unconstitutional. In 1982, Petitioner raised this issue for the first time in a delayed motion for new trial in the state trial court. He also raised it in delayed applications for leave to appeal in Michigan's appellate courts. Petitioner was unsuccessful with the Sandstrom issue until 1985, when his collateral attack resulted in a ruling that his then 18-year-old conviction had to be reversed because of the Sandstrom violation.

To reach the Sandstrom issue, the district court was required to determine whether there had been a state court procedural default. After examining the applicable law and the facts,

the district court found: 1) Petitioner had not objected to the jury instruction at trial; 2) the state prosecutor had not asserted the procedural default to the state courts and had addressed only the merits; and 3) the state courts' rulings went to the merits as well. The district court then held that Wainwright v Sykes, 433 US 72, 97 S Ct 2497, 53 L Ed 2d 594 (1977), did not apply.

In Wainwright v Sykes, supra, the Court held that a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, could not raise the issue on a collateral attack unless the prisoner could show cause and actual prejudice from the default. This cause and prejudice standard is not applied when the state courts overlook the procedural default and address the merits of the issue. County of Ulster v Allen, 442 US 140, 99 S Ct 2213, 60 L Ed 2d 777 (1979).

The application of these rules to the instant case produces an absurd result. When Petitioner was tried in 1967, the instruction given was good law.[3] Petitioner had no legal reason to object to the instruction. It would have been ludicrous to argue in state court that the Petitioner had failed to object to that which was then unobjectionable. Consequently, the state prosecutor did not argue that Petitioner's failure to object at trial to a well-settled standard instruction should

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[3] Sandstrom relies primarily upon two cases, both of which were decided after Petitioner was convicted. These cases are In re Winship, 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970), and Mullaney v Wilbur, 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508 (1975).

preclude appellate review. Petitioner then made a collateral attack without being required to show anything more to the federal court than he had shown to the state courts. Under these circumstances, finality of criminal judgments and notions of comity would be better served if the cause the prejudice standard would be applied.

In United States v Frady, 456 US 152, 102 S Ct 1584, 71 L Ed 2d 816 (1982), the Court "reaffirm[ed] the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." Frady, 71 L Ed 2d at 829. Frady had been convicted of first-degree murder in federal district court. On direct appeal, his conviction was affirmed but his death sentence was reduced to life imprisonment. Nineteen years and numerous post-conviction proceedings later, the Court of Appeals reversed his conviction on a collateral attack. Frady challenged a jury instruction. Although the instruction accorded with standard law when it was given, the law had changed. The Supreme Court held that Frady was required to show cause and actual prejudice for his failure to object at trial and to raise the issue on his direct appeal. Allowing the use of a lesser standard equates direct appeals with collateral attacks.

There is no limit on the time when a collateral attack may be made. The all-too-ready availability of collateral relief undermines the finality of judgments. This situation encourages the view among criminal defendants and the law-abiding public that the criminal justice system in the United States is nothing

more than a relentless "quest for error". Bihn v United States, 328 US 633, 638; 66 S Ct 1172; 90 L Ed 1485 (1946).[4] Application of the cause and actual prejudice standard to cases on the same footing as the instant case will help change this point of view without significant harm to criminal defendants. It maintains the distinction between direct appeal and collateral attack without precluding collateral attack.

The failure to raise claims of error on direct appeal should independently bar their assertion on collateral attack, absent a separate showing of both cause for their omission from the appeal and actual prejudice. Usually the decision on direct appellate review will be made soon enough after trial that a retrial is possible if the conviction is reversed. If the issue is not raised until years later on collateral attack, vacating the conviction may provide something beyond a mere remedy -- it may provide a windfall if retrial is impossible.

The failure to raise an issue on direct appeal could indicate that the alleged error was neither substantial nor significant. Requiring a criminal defendant to raise issues on direct appeal serves society's interest in the finality of criminal judgments. The failure to raise an issue on direct appeal should bar a claim on collateral attack absent a showing of cause and prejudice. Frady, supra.

Not requiring a criminal defendant to show cause and

[4] The law-abiding public includes the families and friends of the murder victims. In the instant case, the family of the victim is deeply distressed by Petitioner's successful collateral attack made 18 years after his conviction.

prejudice where the state court has not relied on the defendant's procedural default results in the federal court having greater regard for the state court's non-use of a contemporaneous objection rule and lesser regard for the state court's affirmance of a criminal conviction. Interest in finality of criminal judgments and notions of comity require a different approach. That approach should be the application of the cause and prejudice standard.

An application of the cause and prejudice standard to the instant case is called for.

In Engle v Isaac, 456 US 107, 102 S Ct 1558, 71 L Ed 2d 783 (1982), and Reed v Ross, 468 US ___, 104 S Ct 2901, 82 L Ed 2d 1 (1984), the Court addressed the concept of cause. As stated in Reed v Ross, 82 L Ed 2d at 15, ". . . where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." In cases where a Sandstrom violation occurred before the decision in Winship, supra, this Court has found cause. McBee v Grant, 763 F2d 811, 817 (CA 6, 1985). Because Petitioner Merlo was convicted in 1967, three years prior Winship, Petitioner has cause for his failure to object at trial.

In Frady, supra, the Court defined prejudice which had been left open for resolution in Wainwright v Sykes, 53 L Ed 2d at 608. To show prejudice, Petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and

substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 71 L Ed 2d at 832, emphasis in the original.

When the record in the instant case is appraised realistically, it seems plain beyond all serious dispute that Petitioner Merlo suffered no actual and substantial prejudice because of the erroneous jury instruction given during his trial. The analysis required is the same applicable to the harmless error issue addressed in Argument I of this brief.

The erroneous instruction was not the only instruction given. The jury was also instructed that the prosecutor bore the burden of proof to establish guilt of the offense beyond a reasonable doubt. (T, 596) The jury was properly instructed on premeditation, and the trial court emphasized that premeditation is an element only of first-degree murder. (T, 597-598) The jury here found Merlo guilty of a premeditated and deliberate murder. The jury thus went beyond the erroneous "implied-malice" language of the Sandstrom instruction to find premeditation and deliberation. Frady, 71 L Ed 2d at 833. This means there was no actual prejudice.

The evidence of Petitioner Merlo's intent is overwhelming. Several weeks prior to the murder, Petitioner made a symbolic death threat to the victim. (T, 553-554) Eyewitnesses testified to Merlo's normal walk on entering and exiting the beauty shop and his polite small talk to the owner. (T, 113, 115, 160, 189, 217-218, 233, 242) The beauty shop was rather small, the furnace room doors were open, customers were close to the

doors, and two people walked into the furnace room while Petitioner and the victim were in there. None of the eyewitnesses heard or saw anything to suggest that Merlo and the victim fought while in the furnace room. (T, 114, 164, 190, 219-220, 223, 238) Merlo followed his wife out of the furnace room. (T, 115) The victim positioned herself behind her customer to begin work. (T, 244) Merlo shot four times at close range. (T, 245) One shot severed the brain stem and another severed the aorta. (T, 152-153) The other two shots were in the abdominal area. (T, 151) Two of the four shots were fired after the victim had fallen to the floor. (T, 115) The only mention of possible intoxication is Merlo's own testimony at trial.

Given this evidence at trial, it is virtually certain that the jury that convicted Petitioner of first-degree murder would still have found premeditation even if the implied-malice instruction had not been given.

By setting aside Petitioner's murder conviction 18 years after the fact without requiring any show of cause or prejudice, the district court has done serious harm to the concept of finality in criminal convictions. Petitioner did not object to this instruction at trial, no issue respecting it was presented or notice on direct appeal, and Petitioner has not demonstrated actual prejudice traceable to the error.

& NO

RELIEF

WHEREFORE, Respondent-Appellant respectfully urges this Court to reverse the United States District Court for the Eastern District of Michigan, Southern Division.

Respectfully submitted,

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DATED: March 24, 1986

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

JOHN MERLO,

Plaintiff-Appellee,

-vs- No. 86-1118

DAN BOLDEN,

Defendant-Appellant.

_____/

STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

PROOF OF SERVICE

Mary K. Geer, being duly sworn, deposes and says that on the 26th day of March, 1986, she served copies of Appellant's Brief upon Frank Lawrence, attorney for Petitioner, by depositing same in an envelope with the Oakland County mailing pick-up service, directed to the said Frank Lawrence at 10811 Farmington Road, Livonia, Michigan 48150.

Further deponent saith not.

Mary K. Geer
MARY K. GEER, Deponent

Subscribed and sworn to before me,
this 26th day of March, 1986.

Margaret A. Bozarth
MARGARET A. BOZARTH, Notary Public
Oakland County, Michigan
My Commission Expires: 10/19/88.